

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-001379-MR

JOHNNY PENN

APPELLANT

APPEAL FROM BOONE CIRCUIT COURT
v. HONORABLE STANLEY BILLINGSLEY, SENIOR JUDGE
ACTION NO. 04-CI-00559

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: COMBS, CHIEF JUDGE; BUCKINGHAM AND KNOPF, JUDGES.

COMBS, CHIEF JUDGE: Johnny Penn, *pro se*, appeals from an order of the Boone Circuit Court of June 4, 2004, dismissing his Open Records request. We affirm.

Penn, an inmate at the Eastern Kentucky Correctional Complex, sent an Open Records Request on December 31, 2004, to the Office of the Commonwealth's Attorney for the 54th Judicial District in Burlington, Kentucky, in which he asked permission to inspect a copy of "[t]he audio cassette tape bearing the statements of any witnesses that may have testified before the

Grand Jury." His letter was postmarked January 5, 2004. The Commonwealth's Attorney responded by letter of January 14, 2004, and explained that Penn's request could not be fulfilled because "our office is exempt from the Open Records Act."

Penn appealed the denial of his request to the Attorney General, who issued an Open Records Decision (04-ORD-035) concluding that the Commonwealth's Attorney had "erred in failing to respond to . . . [Penn's request] . . . in a manner consistent with the requirements of KRS¹ 61.880(1)." KRS 61.880(1) provides in relevant part that

[e]ach public agency, upon any request for records made under KRS 61.870 to 61.884, shall determine within three (3) days, excepting Saturdays, Sundays, and legal holidays, after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the three (3) day period, of its decision. An agency response denying, in whole or in part, inspection of any record shall include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld.

The Attorney General noted that the Commonwealth's Attorney had failed: (1) to respond to Penn's request in a timely manner and (2) to provide an adequate explanation for denying his request. In regard to the omission of an explanation, the Attorney General noted that the pertinent

¹ Kentucky Revised Statutes.

provision of the Open Records Act, KRS 61.878(1)(h), does not exclude from public inspection **all** records maintained by the Commonwealth Attorney's office -- but only those relating to criminal investigations or criminal litigation. The statute states in relevant part that:

records or information compiled and maintained by county attorneys or Commonwealth's attorneys pertaining to criminal investigations or criminal litigation shall be exempted from the provisions of KRS 61.870 to 61.884 **and shall remain exempted** after enforcement action, including litigation, is completed or a decision is made to take no action.

KRS 61.878(1)(h). (Emphasis added.)

Despite the Commonwealth Attorney's imperfect compliance with the requirements of KRS 61.880(1), the Attorney General concluded that there was no substantive error in the denial of Penn's request because grand jury records are specifically exempted from the operation of the Open Records Act.

Penn filed an appeal in the Boone Circuit Court. The Commonwealth's Attorney moved to dismiss the appeal on the grounds set forth in the Opinion of the Attorney General. After hearing the motion on June 3, 2004, the circuit court entered a summary order of dismissal on June 4, 2004. This appeal followed.

Penn's first claim is that the trial court erred in failing to make findings of fact. Our review of the record indicates that the circuit court made oral findings of fact at the hearing on the Commonwealth Attorney's motion to dismiss Penn's appeal. After asking the Commonwealth's Attorney for a clarification of the provision of KRS 61.878(1)(h) that exempts grand jury proceedings from the Open Records Act, the court stated: "We'll find that the grand jury tapes requested are not subject to the Open Records statutes. Request denied."

Penn was not present in court and apparently was not made aware of this finding by the trial court. He did not file a motion for written findings pursuant to CR² 52.04. As a *pro se* litigant, he likely was unaware that this rule provides that:

[a] final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02.

Penn has failed to designate the issues on which he claims that the court should have made findings of fact. In his appeal to the circuit court, he noted that the response that he received from the Commonwealth's Attorney was undeniably late, and he acknowledged that there were "No Genuine Issues[s] of

² Kentucky Rules of Civil Procedure.

Fact in Dispute.” We agree with the circuit court that the errors as to the untimeliness and the lack of specificity of the Commonwealth Attorney’s response were indeed immaterial. Regardless of these errors, Penn was not entitled to the grand jury tapes as a matter of law. See Skaggs v. Redford, 844 S.W.2d 389, 390 (Ky. 1992).

Penn also claims that the circuit court erred in failing to appoint appellate counsel. Except under certain limited circumstances (civil contempt proceedings where imprisonment is a potential punishment or where a prisoner fails to defend a civil action brought against him), there is no constitutional right to counsel in a civil case. May v. Coleman, 945 S.W.2d 426, 427 (Ky. 1997) citing Parsley v. Knuckles, 346 S.W.2d 1, 2-3 (Ky. 1961). The circuit court did not abuse its discretion in refusing to appoint appellate counsel for Penn.

Penn next argues that the circuit court erred in refusing to send him certain records that he had requested. We presume that these records are those referenced in a letter that he sent to the Boone Circuit Court Clerk approximately two months after the filing of the notice of appeal in this case. The letter indicates that Penn had filed a motion in the circuit court to obtain public records from the Division of Probation and Parole in connection with case numbers 01-CR-00264 and 02-

CR-00018. The letter further indicates that a response to his motion was filed by attorneys for the Division of Probation and Parole on July 12, 2004, and that Penn was awaiting a ruling by the trial court on the motion.

The present appeal is from the final order in case number 04-CR-00559. Penn's designation of the record, filed on August 18, 2004, is captioned with case number 04-C[R]-00559 and states that he designates the entire record of the proceedings, videotape of the motion hour held on June 3, 2004, and the case history of 04-C[R]-00559. Thus, the documents pertaining to case numbers 01-CR-00264 and 02-CR-00018 and any rulings by the court on related motions are not part of the record before us. "It is a fundamental rule of appellate practice that after a final judgment has been rendered in the circuit court no additions to the record can be made of matters which were not before the trial court when the judgment was rendered." Fortney v. Elliott's Adm'r, 273 S.W.2d 51, 52 (Ky. 1954). "On appeal, our review is confined to matters properly made a part of the record below." Rohleder v. French, 675 S.W.2d 8, 9-10 (Ky.App. 1984)(citation omitted.) We find no error as to this allegation.

Penn next alleges that the circuit court failed to send him the certification of the record. The record on appeal shows that the trial record was properly certified by the Clerk

of the Boone Circuit Court on October 4, 2004. The certification recites that "copies of this notification have been served upon all parties to the appeal[.]" Even if Penn did not receive this notification, he has failed to explain how he has been prejudiced. This claim is without merit.

We affirm the order of the Boone Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT, *PRO SE*:

Johnny Penn
Burgin, Kentucky