

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001100-MR

MARSHALL COUNTY, KENTUCKY
(E-911 DIVISION); AND MARSHALL
COUNTY E-911 BOARD

APPELLANTS

v. APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 06-CI-00450

PAXTON MEDIA GROUP, LLC
D/B/A WPSD-TV

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: CAPERTON, DIXON, AND VANMETER, JUDGES.

VANMETER, JUDGE: Marshall County, Kentucky (E-911 Division), and
Marshall County E-911 Board (collectively referred to as Marshall County), appeal
from the Marshall Circuit Court's finding that the recording of an emergency 911
call was not statutorily exempt from public disclosure, and directing Marshall

County to comply with the open records request for the recording made by appellee Paxton Media Group, LLC, d/b/a WPSD-TV (WPSD-TV). We affirm.

The parties stipulated that on September 12, 2006, the Marshall County Sheriff's office responded to a 911 call alleging that shots had been fired in a residence on Cumberland Road in Gilbertsville. The bodies of an estranged married couple were found at the residence. On September 13, WPSD-TV identified the deceased and reported that the deaths apparently resulted from a murder/suicide. However, the sheriff's office declined to identify a third person who was in the house but not a suspect in the deaths.

Extensive television and newspaper media coverage followed the shooting. WPSD-TV relied on other sources to determine that the murder victim had resided for several months at the house, and that the third person who was present at the time of the shootings was a physician who owned the house. The victim and the physician, who was identified by name, worked together but the nature of their relationship was not disclosed.

On September 14, 2006, WPSD-TV made a written request to the Marshall County Attorney seeking "a copy of the 911 call." The County Attorney denied the request, stating that "disclosure would constitute a clearly unwarranted invasion of personal privacy as defined in *Bowling v. Brandenburg*," 37 S.W.3d 785 (Ky.App. 2000).

WPSD-TV filed the action below. After rejecting Marshall County's claim that *Bowling* creates a blanket exemption for the nondisclosure of 911 tapes,

the trial court granted WPSD-TV's motion for summary judgment and directed Marshall County to comply with the open records request. This appeal followed.

First, Marshall County asserts that the trial court erred by failing to find that KRS¹ 61.878(1)(a) and *Bowling* preclude public disclosure of a copy of the 911 call. We disagree.

Kentucky's Open Records Act is set out in KRS 61.870 to KRS 61.884. KRS 61.878(1) provides in pertinent part:

The following public records are excluded from the application of KRS 61.870 to 61.884 and shall be subject to inspection only upon order of a court of competent jurisdiction . . . :

(a) Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy;

. . . .

(l) Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly[.]

KRS 61.878(4) directs that "[i]f any public record contains material which is not excepted under this section, the public agency shall separate the excepted and make the nonexcepted material available for examination."

The application of the Open Records Act to emergency 911 calls was addressed by a panel of this court in *Bowling*, 37 S.W.3d 785. In that case, a 911 caller who claimed to be Bowling's grandson alleged that Bowling had threatened

¹ Kentucky Revised Statutes.

to kill his own wife and other family members. However, the investigating officer was advised by Bowling and his wife that no problem existed, and no further action was taken. Bowling subsequently obtained a written record of the call, but his request for a copy of the 911 audio tape was denied by the local chief of police and by the circuit court.

On appeal, Bowling claimed that he was entitled to a copy of the tape because it was a “public record relating to him[,]” KRS 61.884, and because it was not exempt from disclosure under KRS 61.878. This court agreed that the disclosure exceptions set out in KRS 61.878 should be strictly construed, as the policy of the Open Records Act is to permit the ““free and open examination of public records[.]”” 37 S.W.3d at 787, quoting KRS 61.871. More specifically, the Act

envisions a case-specific approach to determining whether access to records is appropriate by providing for *de novo* judicial review of agency actions, and requiring that the agency present proof to sustain its action. . . . “[W]hether an invasion of privacy is ‘clearly unwarranted’ is intrinsically situational, and can only be determined within a specific context.”

37 S.W.3d at 787, quoting *Kentucky Bd. of Exam’rs of Psychologists v. Courier-Journal and Louisville Times Co.*, 826 S.W.2d 324, 328 (Ky. 1992). Nevertheless, this court rejected Bowling’s claim that he was entitled to a copy of the tape, stating that

[t]he competing interests here are the 911 caller’s right to privacy when seeking police assistance versus the public’s right to know about the conduct of government

agencies. Releasing the tapes of 911 calls seeking police assistance, particularly in instances of domestic violence, would have a chilling effect on those who might otherwise seek assistance because they would become subject to . . . retaliation, harassment, or public ridicule.

In addition, the call resulted in only a minimal intrusion upon Bowling. As previously noted, the officer went to Bowling's home, inquired about the safety of the individuals in the home, and left. In this case, the public's right to know the contents of the 911 tape recording must give way to the legitimate privacy interests of those calling 911 to seek police assistance.

788 S.W.2d at 788 (footnote omitted). The court therefore affirmed the trial court's denial of Bowling's request for the release of the 911 tape.

Here, Marshall County notes that the 911 call was made in response to domestic violence between a husband and wife, and it asserts that as in *Bowling*, the 911 caller who sought law enforcement assistance should be free from fear that someone might later use evidence of the call against him. Further, Marshall County equates the privacy interests of the 911 caller herein to those of the 911 caller in *Bowling*, commenting that neither event resulted in criminal charges or court proceedings in which the public has an interest.

We are not persuaded by either claim since here, unlike *Bowling*, the 911 caller was neither an alleged victim of domestic violence nor subject to future threats from the alleged domestic violence perpetrator. Possibly, speculation regarding the victim's relationship with the caller may subject the caller to some embarrassment in the community. However, that fact alone is insufficient to prevent the release of the requested 911 call information, as being of such a

personal nature as to amount to an unwarranted invasion of personal privacy, especially since the record shows that even before the information was formally requested by WPSD-TV, the caller was identified publically by name through other sources. *See Palmer v. Driggers*, 60 S.W.3d 591, 598 (Ky.App. 2001). Moreover, although as in *Bowling* no criminal charges resulted from the 911 call, the situations are not comparable since the absence of charges below reflects only on the fact that the alleged perpetrator was dead, and not on the absence of evidence to support a prosecution of a viable claim against a living defendant as in *Bowling*. The caller's privacy interest and possible desire to avoid embarrassment therefore did not lessen the public's right to know the contents of the 911 tape recording, and the release of the record of the call was not prohibited on this ground.

We also are not persuaded by Marshall County's assertion that the trial court erred by failing to find that KRS 61.878(1)(l) exempts the record of the call from the application of the Open Records Act. As noted above, KRS 61.878(1)(l) acknowledges that public records or information may be legislatively protected from disclosure under the Open Records Act. Here, Marshall County argues that records of 911 calls are legislatively protected from disclosure by KRS 65.752, which prohibits the disclosure of 911 "automatic location identification" (ALI)² information. More specifically, KRS 65.752(4) provides that where "enhanced" 911 service has been implemented,

² See KRS 65.750(3).

an employee of a PSAP [public safety answering point³] shall not retrieve or disclose ALI information except in response to a 911 call or for the purpose of maintaining the ALI database, unless ordered by a court of competent jurisdiction.

KRS 65.752(3) similarly addresses “fully enhanced” 911 service.

The record shows that WPSD-TV’s written request for a “copy of the 911 call” specifically described the date of the call, the identity of the caller, and the location of the residence from which the call was made. As nothing in the request sought the disclosure of ALI information, we are not persuaded that the ALI nondisclosure provisions of KRS 65.752(3) and (4) acted to bar the request. However, if a review of the 911 recording in fact shows that its release would result in the disclosure of ALI information, such information may be redacted from the recording, *see* KRS 61.878(4), or a court of competent jurisdiction could address whether the ALI information should be released.

Finally, we find no merit in Marshall County’s cursory claim that the record of the oral 911 call falls within the scope of the KRS 61.878(1)(i) exemption applicable to “[p]reliminary drafts, notes, correspondence with private individuals[.]”

The order of the Marshall Circuit Court is affirmed.

DIXON, JUDGE, CONCURS.

CAPERTON, JUDGE, DISSENTS.

³ *See* KRS 65.750(8).

CAPERTON, JUDGE, DISSENTING: I can think of few things more personal than desperate pleas for help; the nature of the 911 call. Today we consider the release of information contained in 911 calls, some of which may be mundane but others of a very personal and delicate nature.

In considering Kentucky's Open records Act, as established in KRS 61.870 through KRS 61.884, the exceptions set forth in KRS 61.878(1) are relevant for our purposes. KRS 61.878(1) provides in relevant part:

The following public records are excluded from the application of KRS 61.8870 to 61.884 and shall be subject to inspection only upon order of a court of competent jurisdiction:

(a) Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy[.]

Certainly public monitoring of 911 calls to ensure that state agencies perform their duties is desirable and warranted. However the interest of the public would appear to be the time the call originated, the desperation of the situation and assistance needed, and the time and manner in which the agency responded. The content of the call itself is of little interest to the monitoring public other than snooping in another's business. I can think of little public purpose served by hearing the pleas for help by a 911 caller echoed through the media and over the airwaves and, to the extent such a public purpose might be served, it is certainly outweighed by the personal nature of the call and the privacy interest of the caller. Certainly the release of the communication to the person(s) identified as the caller

or by the caller, or their representative(s), would serve the public interest, and would also maintain the private nature of delicate and intimate matters.

Therefore, I would reverse the decision of the trial court and deny the request for release pursuant to KRS 61.878(1).

BRIEF FOR APPELLANTS:

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