

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 0202

THEODORE J. PHILLIPS

VERSUS

**PATRICK LASALLE, CHIEF OF POLICE; ROGERS
WASHINGTON, DETECTIVE; DAVID BRUNO, WARDEN; TARA
LAROCCA, DETECTIVE; MICHAEL CROCHET, OFFICER;
CHERELL TRIGGS; APRIL ORGEON; YOLANDA DAVIS;
CHALONE MAZE; AND JAMES L. BERNAUER, MAYOR**

Judgment Rendered: September 14, 2011

**Appealed from the
Sixteenth Judicial District Court
In and for the Parish of St. Mary, Louisiana
Docket Number 121,709**

Honorable Edward M. Leonard, Jr., Judge Presiding

**Theodore J. Phillips
Angola, LA**

Plaintiff/Appellant, in proper person

**Russel J. Cremaldi
Franklin, LA**

**Counsel for Defendants/Appellees,
Chief of Police Patrick LaSalle,
Rogers Washington, Kirby
Madison, Clyde Phillips, James
Carinhas, and James L. Bernauer**

**Michael J. Crochet
Morgan City, LA**

Defendant/Appellee, in proper person

BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

WHIPPLE, J.

An inmate appeals from a judgment of the district court, granting the defendants' motion for summary judgment and dismissing his petition for the production of documents and a video tape that were the subject of a public records request made to defendants. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On March 9, 2004, Theodore Phillips was convicted of one count of armed robbery, in violation of LSA-R.S. 14:64, and one count charging the armed robbery firearm enhancement penalty, in violation of LSA-R.S. 14:64.3, for which he was sentenced to twenty-five years and five years respectively on the two convictions, both at hard labor, and with the sentences to run consecutively. However, when Phillips was subsequently adjudicated a habitual offender pursuant to LSA-R.S. 15:529.1, the twenty-five year sentence was vacated, and he was sentenced to serve sixty-six years at hard labor. In an opinion rendered on June 9, 2006, this court affirmed the convictions, but amended the five-year sentence to delete the provision that it be served at hard labor. In all other respects, the sentences were affirmed. State v. Phillips, 2005-2460, pp. 12-13 (La. App. 1st Cir. 6/9/06)(unpublished), 931 So. 2d 564 (table). The Louisiana Supreme Court thereafter denied Phillips' writ application on January 12, 2007. State v. Phillips, 2006-1642 (La. 1/12/07), 948 So. 2d 139.

On April 22, 2010, Phillips filed the instant suit, naming as defendants: Patrick LaSalle, the Chief of Police of the Patterson Police Department; Rogers Washington, Kirby Madison, Clyde Phillips, and James Carinhas, who were purportedly officers of the Patterson Police Department; Tara LaRocca, a detective with the St. Mary Parish Sheriff's Office; David

Bruno of the Baldwin Police Department; Michael Crochet of the Morgan City Police Department; James Bernauer, the Mayor of Patterson; Yolanda Davis; Cherell Triggs; April Orgeon; and Chalon Maize.

In his petition, Phillips contended that he wrote several letters to Chief LaSalle requesting surveillance video tapes for the robbery of Ganaway's Convenience Store that occurred on June 24, 2003, i.e., the armed robbery for which Phillips was convicted. He further claimed that Chief LaSalle had other records of the incident in addition to the surveillance tapes, including, among other things, the 911 audio tape for the date of the armed robbery, crime scene lab reports, supplemental investigation reports, audio tape recordings, the entire file related to this incident, and photographs. Phillips then requested in his petition that he be provided with the requested documents and records.

Attached to his petition were copies of an August 11, 2008 letter to Lieutenant James Carinhas of the Patterson Police Department, making a public records request for documents and evidence, and a December 8, 2008 letter to the Patterson Police Department, requesting a copy of all initial and supplemental police reports pertaining to his arrest and the investigation of the June 24, 2003 armed robbery of Ganaway's Convenience Store. However, in neither letter did Phillips state that his request was in any way related to any claim for post conviction relief.¹

¹Additionally, Phillips attached to his petition a December 8, 2008 letter to the indigent defender in Franklin, Louisiana, referencing October 17, 2008 and November 19, 2008 orders of another Sixteenth Judicial District Court judge rendered in another proceeding in the district court, which orders were apparently related to a claim by defendant for post conviction relief and access to the records at issue herein in the instant public records request. In the December 8, 2008 letter, Phillips requested assistance from the public defender in obtaining from the district attorney and the court reporter the public records at issue herein, which allegedly were ordered produced by the October 17, 2008 order rendered in the other action before the other district judge.

Chief LaSalle, Washington, Madison, Phillips, Carinhas, and Bernauer (hereinafter referred to as “the Patterson Police defendants”) answered the petition, and in the answer, Washington, Madison, Phillips, Carinhas, and Bernauer all denied the allegation that they had received any letters from Phillips requesting documents or records.² Chief LaSalle acknowledged in the answer that he had received at least one letter from Phillips requesting production of certain items, but specifically denied that either he or the Patterson Police Department had any of the requested items.

The Patterson Police defendants then filed a motion for summary judgment, contending that they were entitled to judgment in their favor as a matter of law, dismissing Phillips’s claims against them on the basis that, pursuant to LSA-R.S. 44:31.1 of the Public Records Act, Phillips was not a “person” qualified to seek production of public records given his status as a convicted felon currently serving time for those convictions. In support of their motion, the Patterson Police defendants submitted evidence of Phillips’s convictions and sentences.

In opposition to the motion, Phillips did not dispute his status, but merely contended that the requested items had been withheld from him prior to and after his criminal trial, that the public records requested (particularly the surveillance video) constituted exculpatory evidence, and that the records requested were limited to grounds upon which he could file for post conviction relief. However, he offered no countervailing affidavits or evidence to support this claim (or to refute the defendants’ showing as to his status).

²A letter signed by defendant Michael Crochet advising that he was not in possession of the requested documents was filed into the record on August 26, 2010. The record does not contain answers from any of the remaining named defendants.

Following a hearing on the motion, the trial court granted the motion for summary judgment and dismissed Phillips's claims against the Patterson Police defendants. From this judgment, Phillips now appeals, contending in his sole assignment of error that the trial court erred in granting the motion for summary judgment and dismissing his claims against the Patterson Police defendants upon the allegation that he is not a "person" under the law and not qualified to request public records.

BURDEN OF PROOF AND STANDARD OF REVIEW FOR SUMMARY JUDGMENT

A motion for summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B). The summary judgment procedure is expressly favored in the law and is designed to secure the just, speedy, and inexpensive determination of non-domestic civil actions. LSA-C.C.P. art. 966(A)(2).

The mover bears the burden of proving that he is entitled to summary judgment. LSA-C.C.P. art. 966(C)(2). However, if the mover will not bear the burden of proof at trial on the subject matter of the motion, he need only demonstrate the absence of factual support for one or more essential elements of his opponent's claim, action, or defense. LSA-C.C.P. art. 966(C)(2). If the moving party points out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense, then the nonmoving party must produce factual support sufficient to satisfy his evidentiary burden at trial. LSA-C.C.P. art. 966(C)(2). If the mover has put forth supporting proof through affidavits or otherwise, the adverse party may not rest on the mere allegations or denials

of his pleadings, but his response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial. LSA-C.C.P. art. 967(B).

If, on the other hand, the mover will bear the burden of proof at trial, that party must support his motion with credible evidence that would entitle him to a directed verdict if not controverted at trial. Hines v. Garrett, 2004-0806 (La. 6/25/04), 876 So. 2d 764, 766. Such an affirmative showing will then shift the burden of production to the party opposing the motion, requiring the opposing party either to produce evidentiary materials that demonstrate the existence of a genuine issue for trial or to submit an affidavit requesting additional time for discovery. Hines, 876 So. 2d at 766-767.

In ruling on a motion for summary judgment, the trial court's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. Hines, 876 So. 2d at 765. Despite the legislative mandate that summary judgments are now favored, factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion, and all doubt must be resolved in the opponent's favor. Willis v. Medders, 2000-2507 (La. 12/8/00), 775 So. 2d 1049, 1050.

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. East Tangipahoa Development Company, LLC v. Bedico Junction, LLC, 2008-1262 (La. App. 1st Cir. 12/23/08), 5 So. 3d 238, 243-244, writ denied, 2009-0166 (La. 3/27/09), 5 So. 3d 146.

DISCUSSION

The right of access to public records is a fundamental right guaranteed by the Louisiana Constitution. LSA-Const. art. XII, § 3. Because this right is fundamental, access to public records may be denied only when the law specifically and unequivocally denies access. Any request for a public record must be analyzed liberally in favor of free and unrestricted access to the record. Johnson v. Stalder, 97-0584 (La. App. 1st Cir. 12/22/98), 754 So. 2d 246, 248.

The Public Records Act, LSA-R.S. 44:1 et seq., sets out a procedure to guarantee access to various public records. Pursuant to LSA-R.S. 44:31, each person of the age of majority has the right to inspect, copy, or reproduce, or to obtain a reproduction of, any public record, except as otherwise provided by law. Moreover, LSA-R.S. 44:32(A) states in part that the “custodian shall present any public record to any person of the age of majority who so requests.”

However, while the constitution does not define or restrict the word “person,” LSA-R.S. 44:31.1 of the Public Records Act does restrict the word “person,” in pertinent part, as follows:

For the purposes of this Chapter, person does not include an individual in custody after sentence following a felony conviction who has exhausted his appellate remedies when the request for public records is not limited to grounds upon which the individual could file for post conviction relief under Code of Criminal Procedure article 930.3

Thus, LSA-R.S. 44:31.1 excludes from the definition of “person” certain inmates in custody who have exhausted appellate remedies for their felony convictions. Such an inmate’s access to public records is restricted, in that the inmate’s request is limited to grounds upon which the inmate may file for certain categories of post conviction relief. Johnson, 754 So. 2d at 249.

In the correspondence attached to his petition and at the hearing on the motion for summary judgment, Phillips conceded that he is a convicted felon whose sentence is final and who is serving time for that conviction. Nonetheless, on appeal, Phillips contends that he is entitled to the items sought because they constitute evidence withheld by the State, which would exonerate him if produced. Relying on Brady v. Maryland, 373 U.S. 83, 87-88, 83 S. Ct. 1194, 1196-1197, 10 L. Ed. 2d 215 (1963), Phillips now argues that the State's suppression of this evidence violates his due process rights and entitles him to post conviction relief. Contrary to his representations to the trial court at the hearing on the motion for summary judgment, i.e., that he had previously filed an application for post conviction relief, but was not given "the same documents that I'm suing for today," he contends on appeal that he was previously unaware of this evidence, which he now claims is necessary for an application for post conviction relief.

In support of the trial court's judgment granting the motion for summary judgment, the Patterson Police defendants respond that Phillips is not a "person" as defined in the Public Records Act because he is a convicted felon serving time for said crime and, further, because his petition did not include any allegation that the request for records was made for the purposes of post conviction relief, nor did he file any countervailing affidavit in opposition to their motion for summary judgment asserting that the reason for his public records request was related to post conviction relief. We agree.

Phillips undisputedly is "in custody after sentence following a felony conviction." LSA-R.S. 44:31.1. He has exhausted his appellate remedies. Thus, he is not a "person" for purposes of the Public Records Act if his request for public records is not limited to grounds upon which he could file

for postconviction relief under LSA-C.C.P. art. 930.3. Lay v. The City of Slidell, 96-2335 (La. App. 1st Cir. 11/7/97), 704 So. 2d 282, 283. While no stated purpose for the public records request relating to post conviction relief was set forth in the letters to the Patterson Police Department seeking the records or in his petition below,³ in his opposition to the motion for summary judgment, Phillips's stated purpose for obtaining these records is a generic allegation that "to file a proper Post-conviction I would have to have documents." Thus, it appears that Phillips seeks to embark on a fishing expedition. See Lay, 704 So. 2d at 283. Moreover, while an allegedly withheld video tape of the commission of the robbery at Ganaway's Convenience Store⁴ might under certain circumstances support a ground for post conviction relief under article 930.3(1), we note that, as established at his criminal trial, Phillips' conviction was not based upon his committing the actual armed robbery. Rather, he drove the getaway car and, thus, was convicted on the basis that he was a principal to the armed robbery. State v. Phillips, 2005-2460 at pp. 3-7 (unpublished). Thus, any alleged video tape of the actual robbery could not constitute exculpatory evidence herein entitling Phillips to post conviction relief.

Further, insofar as Phillips seeks production herein from the Patterson Police defendants, at the hearing on the motion for summary judgment, Phillips conceded that the Patterson Police Department "were the ones that arrest me, did the investigation, and **sent all those documents to the D.A. office**. So it's not just only the video tape it's other documents too leading to my arrest and conviction." (Emphasis added). Thus, he clearly acknowledged that the Patterson Police Department had turned over all

³In his petition herein, Phillips merely stated that "this litigation maybe [sic] settled with by providing the requested information."

documentation to the District Attorney's office. Furthermore, as reflected in the correspondence attached to his instant petition and his admissions at the hearing below, Phillips admittedly had previously filed a claim for post conviction relief seeking this documentation from the district attorney, (although he contended he had not been furnished the documents by that office).

The correspondence attached to Phillips's petition herein indicates that Phillips's purpose in filing the instant suit was to have the district court judge in these proceedings address his dissatisfaction with prior court orders in another proceeding in the district court below. His correspondence reflects his belief that the previous court erred and that "the judge is under the false pretense that the District Attorneys and Court Reporter has complied with the order given on October 17, 2008, and that all is well. But the District Attorney and Court Reporter has not complied with the Judge's ORDER, and I have not been furnished or provided with specific documents." However, the filing of a duplicative proceeding for the production of public documents is not the proper procedure to follow in seeking to enforce orders of the district court rendered in another action, nor is Phillips's purpose in filing the instant suit limited to grounds upon which he could file for post conviction relief under LSA-C.C.P. art. 930.3.

Accordingly, considering the foregoing and the record as a whole, we find no error in the trial court's conclusion that, pursuant to LSA-R.S. 44:31.1, these defendants were entitled to judgment in their favor as a matter of law, inasmuch as Phillips is not a "person" entitled to the production of the public records sought herein.

⁴We point out that the record before us also raises serious questions as to the existence of any such surveillance video.

CONCLUSION

For the above and foregoing reasons, the December 16, 2010 judgment of the trial court, granting the motion for summary judgment filed by the Patterson Police defendants and dismissing Phillips's claims against them, is affirmed. Costs of this appeal in the amount of \$599.50 are assessed against plaintiff/appellant, Theodore J. Phillips.

AFFIRMED.