No. ED105782

IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

CURTIS FARBER,
Plaintiff-Appellant,

v.

METROPOLITAN POLICE DEPARTMENT OF
THE CITY OF ST. LOUIS,
Defendant-Respondent.

Appeal from the Circuit Court of the City of St. Louis, Missouri
Case No. 1622-CC05285

Appellant's Reply Brief

ANTHONY E. ROTHERT, #44827
JESSIE STEFFAN, #64861
ACLU of Missouri Foundation
906 Olive Street, #1130
St. Louis, Missouri 63101
(314) 652-3114 telephone
(314) 652-3112 facsimile

GILLIAN R. WILCOX, #61278
ACLU of Missouri Foundation
406 West 34th Street, Suite 420
Kansas City, Missouri 64111
(816) 470-9933 telephone
(816) 652-3112 facsimile

Attorneys for Appellant

Table of Contents

Table of Authorities

Cases

Statutes

Argument

A. The report of the investigation directed at alleged criminal conduct is an "investigative report" under the Sunshine Law.

Defendant does not dispute that Farber's citizen complaint is an "incident report" under the Sunshine Law, the complaint alleges criminal conduct, and the investigation was directed to the alleged conduct. This fits squarely into what the Supreme Court presumed in *Guyer v. City of Kirkwood*: when a citizen's complaint implicates a police officer in criminal conduct, "it should be presumed that such alleged criminal conduct was the subject of the investigation, and the report generated by the investigation must be disclosed." 38 S.W.3d 412, 415 (Mo. banc 2001).

Because there is no dispute that the alleged criminal conduct was the subject of the investigation, the resulting report is an open record regardless of whether portions of the report might meet the definition of "personnel record," or records containing "information relating to the performance or merit of individual employees" under section 610.021.[1] Regardless of whether portions of the record could be permissively closed on their own if, hypothetically, they were not part of the investigative report, they are, *in fact*, a part of the investigative report. An "investigative report" is "a record, other than an arrest or incident report, prepared by personnel of a law enforcement agency, inquiring into a crime or suspected crime, either in response to an incident report or in response to evidence developed by law enforcement officers in the course of their duties."

[1] All statutory references are to Missouri Revised Statutes (2000), as updated.

§ 610.100.1(5). *All* of the records at issue in this case were prepared by personnel of a law enforcement agency inquiring into a suspected crime in response to an incident report.

Defendant emphasizes that, here, the trial court found portions the report met the definition of a disciplinary record—a finding that did not exist in *Guyer*. Defendant argues further that the *Guyer* presumption has been rebutted because the police department has demonstrated that its investigation was not "directed to alleged criminal conduct." *See Guyer*, 38 S.W.3d at 415. However, these points merely beg the question whether the Department's unilateral decision to view allegations of criminal conduct as not warranting prosecution alone is enough to keep the Department's investigation into alleged criminal conduct a secret, even from the victim. The answer is no.

The rebuttable presumption here is that, when a citizen complaint implicates police officers in criminal conduct, the alleged conduct is the subject of the subsequent investigation. *See Guyer*, 38 S.W.3d at 415. "A presumption places the burden of producing substantial evidence to rebut the presumed fact on the party against whom the presumption operates." *Deck v. Teasley*, 322 S.W.3d 536, 539 (Mo. banc 2010). "The effect of that presumption is governed by the general law of presumptions." *Id.* "A presumption places the burden of producing substantial evidence to rebut the presumed fact on the party against whom the presumption operates." *Id.* "When substantial evidence is produced rebutting the presumed fact, the case is decided on the basis of the evidence as if no presumption existed." *Id.* "In Missouri, the quantum of proof generally required to rebut a presumption is "substantial evidence."" *Id.* at 540. "In

the context of presumptions, [the Missouri Supreme Court] has held that 'substantial evidence' is 'evidence which, if true, has probative force upon the issues, i.e., evidence favoring facts which are such that reasonable men may differ as to whether it establishes them....'" *Id.* (quoting *Terminal Warehouses of St. Joseph, Inc. v. Reiners*, 371 S.W.2d 311, 317 (Mo.1963) (internal citations omitted)).

To rebut the presumption, Defendant has to produce substantial evidence that the alleged criminal conduct was *not* the subject of the investigation. But everyone agrees: the alleged criminal conduct *was* the subject of the investigation. Thus, "the report generated by the investigation must be disclosed." *Guyer*, 38 S.W.3d at 415.

This result does not change because the trial court observed that "[t]here can be no question on this record that the IAD report on plaintiff's complaint and the *Garrity* statements reflected therein were and are records relating to the firing or disciplining of the named police officers, and that personal information about the officers was discussed or recorded in those records." LF 150-51; Respondent's Brief at 17-18. This language does not suggest that the alleged criminal conduct was not the subject of the investigation. That the investigation was directed at alleged criminal conduct is the pertinent fact for determining that the reports produced as part of the investigation constitute an "investigative report" under the Sunshine Law. The Department cannot escape the Sunshine Law's requirement of transparent investigations directed at alleged criminal conduct by conducting an investigation into allegations of alleged criminal conduct but labeling it as a personnel matter.

Defendant's unremarkable observation that the Sunshine Law does not create a "duty for the Police Department to perform a criminal investigation in response to a citizen complaint," Respondent's Brief at 22, is a red herring. What is relevant is that the Department *did* conduct an investigation directed at the allegations of alleged criminal conduct and prepared the record at issue as a part of that investigation.

B. The trial court misapplied *Laut v. City of Arnold*, 417 S.W.3d 315 (Mo. App. E.D. 2013).

As this Court noted in *Laut*, the exemptions in §§ 610.021(3) and (13), apply "only where disclosure is not otherwise required by law." *Laut v. City of Arnold*, 417 S.W.3d 315, 319 (Mo. App. E.D. 2013) (citing *Guyer*, 38 S.W.3d at 414). Furthermore, while this Court did examine the Sunshine Law in *Laut* as it relates to "both public records in general and investigative reports in specific," this Court's decision was improperly applied by the trial court.

The Sunshine Law request in *Laut* sought information related to the "[i]mproper use of REJIS" by employees of the police department and it specifically asked for both "investigative reports and any other records." *Laut*, 417 S.W.3d at 318. One of the genuine fact issues in *Laut* that led to remand was the nature of the IAD report that had been created and, therefore, whether the presumption in *Guyer* was controlling. *See id.* at 321-22. As this Court noted, "[t]he key aspect of an investigative report is that it is 'directed to alleged criminal conduct.'" *Id.* at 321 (citing *Guyer*, 38 S.W.3d at 415). And, like the present case, in *Laut*, the specific request for investigative reports related to "an Internal Affairs report, which resulted from the Internal Affairs investigation" ordered

after the complaint was received. *Id.* And, while this Court did discuss the relevant law as it relates to Internal Affairs investigations and the reports they produce, there was also "a genuine factual dispute … as to the nature of the Internal Affairs report" precluding summary judgment and requiring a remand for further inquiry into the report. *Id.* On remand, "[a]fter reviewing the records *en camera*, … the trial court found that the city's 'contention that the Internal Affairs report is in whole, or in part, a personnel record is wholly inaccurate.'" *Laut v. City of Arnold*, 491 S.W.3d 191, 195 (Mo. banc 2016). This finding was based upon the trial court's finding "that the internal affairs investigation as initiated after a complaint of alleged criminal activity and the investigation became inactive when the subject of the investigation resigned, making the internal affairs report a record of a closed investigation that must be disclosed under 610.100.2." *Id.*[2] The appeal from the decision on remand dealt only with the issue of whether the violation was knowing or purposeful. *Id.* at 196-202. Here, like in *Laut*, the record demonstrates that the IAD report was directed at an allegation of criminal conduct, therefore, it is an open record that must be disclosed. And, as discussed in Farber's opening brief, the record here cannot and should not be separated into exempt and non-exempt records.

[2] Noting further that, "the trial court ordered the disclosure of the report with a portion related to employees' timesheets redacted." *Laut*, 491 S.W.3d at 195.

Conclusion

The trial court erred in finding that any portion of IAD report 13/131 could be closed under § 610.021(3) and (13). Farber's complaint alleged criminal conduct by the police officers and the investigation following such a complaint is an investigative report under the plain language of the Sunshine Law. Investigative reports are open records. The trial court's decision should be reversed to the extent that it found any portion of the investigative report can be closed under § 610.021(3) and (13).

Respectfully submitted,

/s/ Anthony E. Rothert
Anthony E. Rothert, #44827
Jessie Steffan, #64861
ACLU of Missouri Foundation
906 Olive Street, #1130
St. Louis, Missouri 63101
(314) 652-3114
arothert@aclu-mo.org
jsteffan@aclu-mo.org

Gillian R. Wilcox, #61278
ACLU of Missouri Foundation
406 West 34th Street, Suite 420
Kansas City, Missouri 64111
(816) 470-9933
gwilcox@aclu-mo.org

Certificate of Service and Compliance

The undersigned hereby certifies that on February 13, 2018, the foregoing brief was filed electronically and served automatically on counsel for all parties.

The undersigned further certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06 and Local Rule 360; (3) contains 1,419 words, as determined using the word-count feature of Microsoft Office Word. Finally, the undersigned certifies that electronically filed brief was scanned and found to be virus free.

/s/ Anthony E. Rothert