IN THE COURT OF APPEALS OF IOWA

No. 4-497 / 93-1578

FILED
JAN 23 1995
CLERK SUPREME COURT

DON BURGMAIER, JOHN HARVEY, and **SHIRLEY TOOMEY,**

Appellants,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Polk County, Linda R. Reade, Judge.

Appeal from dismissal of petition for writ of mandamus. **AFFIRMED.**

Don Burgmaier and John Harvey, Des Moines, pro se, and Shirley Toomey, Ottumwa, pro se.

Bonnie J. Campbell, Attorney General, Gordon E. Allen, Deputy Attorney General, and John M. Parmeter, Special Assistant Attorney General, for appellee.

Heard by Donielson, C.J., and Sackett and Cady, JJ.

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DONIELSON, C.J.

At issue is the district court's grant of a motion to dismiss the appellants' application for writ of mandamus. Upon our review of the parties' arguments and the applicable law, we find the petition was properly dismissed, and we affirm the district court's ruling.

I. BACKGROUND

On June 7, 1993, the appellants, Don Burgmaier, John Harvey and Shirley Toomey, submitted a written request to the Department of Human Services requesting a copy of "the Appendix to the Joint Field and Central Office Survey of Child Protective Services." The request demanded the information be provided by 2:00 p.m. on that date. The appellants did not receive the requested document by that time, and they filed an application for writ of mandamus at 3:06 p.m. on the same day.

On June 28, 1993, the State filed a motion to dismiss. On July 6, 1993, the appellants filed an amendment to their application for writ of mandamus to correct the parties listed in the caption. On August 26, 1993, the appellants filed a motion to amend. This motion contained two divisions. The first division alleged the State illegally maintained a separate registry of rejected child abuse intake reports, and the appellants requested documents relating to these reports as well as copies of an attorney general's memorandum purportedly giving the State authority

to retain such reports. The second division requested "de-identified records" maintained in connection with the State's child abuse registry.

A hearing on the motion to dismiss was held on September 15, 1993. On September 25, 1993, the district court filed a ruling granting the State's motion to dismiss. At the time of the hearing the appellants had received all of the "Joint Field and Central Office Survey of Child Protective Services" report except those portions of the records which the State deemed confidential.

The district court determined the custodian of the records had complied with his duty provide public records for examination and had provided the records within twenty days. See Iowa Code § 22.8(4). The court concluded the limited remedy of mandamus was not appropriate for addressing the appellants' contention they were entitled to examine the redacted portions of the records. An appeal was filed and our review is de novo. Neyens v. Roth, 326 N.W.2d 294, 297 (Iowa 1982).

Motion For Leave To Amend

At the outset we must determine whether the issues raised in the appellants' August 26 motion for leave to amend are properly considered in ruling on the motion to dismiss. At the time this motion was filed the appellants had already amended their petition once as a matter of course on July 6, 1993. They were required to obtain leave

of the court to further amend their petition. Iowa R. Civ. P. 88. Leave had not been granted prior to entry of the ruling on the motion to dismiss, and we do not consider the allegations of the second amendment in reviewing this appeal.

II. MANDAMUS

Mandamus is an action brought to obtain an order commanding a person to do an act, the performance of which the law enjoins as a duty resulting from an office, trust or station. House v. Moulder, 469 N.W.2d 265, 266 (Iowa App. 1991). Mandamus is a drastic remedy to be applied only in exceptional circumstances. Hewitt v. Ryan, 356 N.W.2d 230, 233 (Iowa 1984).

In ruling on a motion to dismiss a mandamus petition, both the district court and this court are obliged to accept the facts as plead in the petition. Stafford v. Valley Community School Dist., 298 N.W.2d 307, 308 (Iowa 1980). Mandamus is not to be used to establish rights but to enforce rights that have already been established. Ryan, 356 N.W.2d at 233. A person may use mandamus to enforce only clear and certain legal rights. See Stafford 298 N.W.2d at 309. Where there is an unresolved threshold question as to whether a person has a legal right, mandamus is not available. See id. 298 N.W.2d at 309 (plaintiff could not use mandamus to compel school district to appeal termination to adjudicator where threshold question existed

as to whether she was a nonprobationary employee eligible to appeal her termination).

The appellants are correct in that they are entitled to examine public records under chapter 22 of the Iowa Code and may enforce the provisions of that chapter by mandamus. Iowa Code § 22.5 (1993). However, their right to examine public records is not absolute and does not extend to confidential records. Whether the redacted portions constitute confidential records is a threshold question precluding mandamus. Mandamus is too limited a remedy to address this issue. The appellants' right to injunctive or civil relief pursuant to section 22.10 are more appropriate means for obtaining a judicial determination of the confidential nature of these records. The district court was correct in dismissing the application for writ of mandamus.

AFFIRMED.

Cady, J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

I dissent.

Appellants Don Burgmaier, John Harvey, and Shirley Toomey are Iowa citizens who sought to obtain records from the Iowa Department of Human Services. Appellants appear before this court, without the assistance of an attorney, seeking help in obtaining certain records they say were denied to them.

The majority has affirmed the trial court's denial of appellants' petition for mandamus. The majority has not addressed any issues appellants raise and does not find appellants are not entitled to the information they seek. The majority dismisses appellants' request finding only that mandamus is too limited a remedy and it is more appropriate appellants file a different kind of action.

The Iowa legislature has clearly provided for the public and citizens to have access to certain records of state and other governmental bodies.

Iowa Code chapter 22, titled, Examination of Public Records, provides, in part:

> Right to examine public records-exception.
>
> 1. Every person shall have the right to examine and copy public records and to publish or otherwise disseminate public records or the information contained therein . . . .

Iowa Code § 22.2 (1993).

> Definitions:
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> * * *

> 3. As used in this chapter, "public records" include all records, documents, tape or other information, stored or preserved in any medium, of or belonging to this state . . . .

Iowa Code § 22.1(3) (1993).

The chapter further provides certain responsible restrictions on where and how and under what supervision the records may be examined, see Iowa Code §§ 22.2, 22.3, and 22.4, as well as defining confidential records not subject to examination, see Iowa Code § 22.7 (1993), as well as providing for enforcement of the rights:

> The provisions of this chapter and all rights of persons under this chapter may be enforced by mandamus or injunction, whether or not any other remedy is also available.

Iowa Code § 22.5 (1993).

The information appellants seek to obtain relates to the general operating procedures of the department.

Appellants, not residents of our capitol city, came to Des Moines to get the information. When it was not made available to them, they went to the Polk County Courthouse and, without an attorney, filed a mandamus action as section 22.5 suggested they do to enforce their request. I agree, appellants were hasty in filing the action but, by the time the matter reached the trial docket, sufficient time had passed for the agency to comply with their request and, while reports were given to them, they contend substantial information was blocked out in black on the reports.

When the matter came to trial, the trial court said a mandamus action was not the proper action to challenge the failure of the department to give appellants the blacked-out portions of the reports. This court has affirmed the trial court finding appellants are correct in that they are entitled to examine public records and may enforce the provisions of chapter 22 that allows them to do so by mandamus. But, the majority affirmed the dismissal of the action finding mandamus is too limited a remedy to address the issue and there are more appropriate means for appellants to obtain a judicial determination of the confidential nature of the records.

The matter could have been resolved at the trial court level in the mandamus action by an in-camera examination by the trial judge of the blacked-out information to determine if the agency was correct in not making it available to the appellants. In The Hawk Eye v. Jackson, ____ N.W.2d (Iowa 1994), a mandamus action seeking certain D.C.I. reports, the trial court ordered the D.C.I. make a report available subject to the deletion of certain data.

The spirit of the law, in this case, a citizen's right to know what state government is doing, has been lost. Appellants, none of them lawyers and appearing to be of modest means, have filed this action themselves. They asked us in oral arguments not to throw technical, legal road blocks in their way.

The legislature in enacting section 22.7 paved the way for a mandamus action to challenge the refusal to turn over alleged public records.

The State asks us to do what the majority has done, decide the case on a narrow procedural issue. The State is represented in this case by a battery of lawyers who, too, work for the citizens of Iowa. While the state may expend more resources fighting another legal action, the state has the resources to do it. Requiring these appellants to pay another filing fee and make more trips to Des Moines may well result in their being discouraged and unable to proceed.

If appellants were represented by an attorney, they would have been more precise in what they asked. I think procedure, in this case, must be balanced against appellants' important rights as citizens to know what their government does. Few citizens seek access to the courts to exercise the right to see public records. Many of our challenges to seal or excise records come from the news media. See The Hawk Eye, ___ N.W.2d at ___.

I would remand to the trial court to make a determination of whether all information that has been blacked out is, in fact, confidential. If the information is confidential, appellants should fail. If the information is not confidential, that part of the blacked-out information that is not confidential should be made available to appellants.