IN THE COURT OF APPEALS OF IOWA

No. 0-455 / 89-1877

FILED
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CLERK SUPREME COURT

VICTOR HERBERT,

Appellant,

vs.

J. PATRICK WHITE, In His Official Capacity as Johnson County Attorney,

Appellee.

Appeal from the Iowa District Court for Johnson County, Lynne E. Brady, Judge.

Petitioner appeals trial court's dismissal of his writ of mandamus to order the respondent to produce certain documents in his possession. **AFFIRMED.**

Michael K. Botts, Kansas City, Missouri, for appellant.

J. Patrick White, County Attorney, and Julie Schmitz, Legal Intern, for appellee.

Considered by Oxberger, C.J., and Donielson and Habhab, JJ.

OXBERGER, C.J.

Petitioner Victor Herbert, M.D., J.D., was charged with the simple misdemeanors of assault and theft in the fifth degree. These charges arose from an incident at the University of Iowa where Herbert participated in a presentation. On August 10, 1987, a Johnson County Associate District Court convicted Herbert of assault and theft in the fifth degree. On appeal, the Johnson County District Court reversed the conviction finding Herbert not guilty. The Johnson County Attorney's Application for Discretionary Review was denied December 29, 1987.

Herbert's attorney sent a letter dated November 2, 1987, to the Johnson County Attorney's office requesting certain documents from the file compiled for his prosecution. The county attorney's office responded in a November 23, 1987, letter that all public documents had already been provided to Herbert. Herbert then filed this petition for writ of mandamus, claiming that under Iowa Code chapter 22 (1989) the county attorney was required to produce the documents. The county attorney, J. Patrick White, responded that Herbert's petition should be dismissed because he failed to properly exercise his right to examine and copy the documents. Additionally, White asserted the petition should be dismissed because all of the documents requested were confidential pursuant to Iowa Code section 22.7(4)(1989).

At a hearing about the matter, the trial court ordered White to copy all documents requested by Herbert and provide them to the court. The order permitted White to voluntarily provide any of the documents to Herbert as a discretionary act. The order also required White provide Herbert's counsel with an itemized list of all documents claimed to be privileged.

Subsequently, Herbert received part of the documents per White's discretion, even though White maintained they were attorney work product and therefore confidential. At the June 26, 1989, trial held on the petition for writ of mandamus, Herbert withdrew his request for production of several documents, leaving only six documents in dispute. The court found the documents were confidential records pursuant to section 22.7(4) because they were the work product of an attorney which were related to litigation. The court dismissed the action. Herbert appealed.

Herbert contends the documents in this case are not "work product" as the term is used in Iowa Rule of Civil Procedure 122(c). He states the documents he seeks were received by the county attorney from other sources and therefore were not produced by the county attorney.

Herbert also contends the county attorney did not meet his burden of proof to show the documents were confidential attorney work product. Herbert asserts he presented a prima facie case, which shifted the burden to the county

attorney to show the documents were mental impressions, conclusions, or opinions.

Finally, Herbert contends he is entitled to attorney fees and costs under Iowa Code section 22.10(2) because the county attorney wrongfully refused to produce the requested documents.

White argues Herbert did not properly exercise his rights under chapter 22 and an attorney's work product should not be freely discoverable in subsequent litigation.

Since a writ of mandamus is an action in equity, our review of this matter is de novo. Iowa Code § 661.3; Iowa R. App. P. 4.

White concedes the documents in his office are subject to Iowa Code chapter 22, which provides the public with the right to examine and copy public records. White contends the documents requested by Herbert are all confidential records which are excepted from the public's general right to examine and copy public documents.

Iowa Code section 22.2(1), which creates the public's right to examine public records, states in part: "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. The right to copy public records shall include the right to make photographs or photographic copies while the records are in the possession of the custodian of the records . . ."

Iowa Code section 22.7(4) excludes: "[r]ecords which represent and constitute the work product of an attorney, which are related to litigation or claim made by or against a public body" from the chapter's general provisions allowing the public to inspect and copy public records.

Chapter 22 does not require that custodians of public records must respond to letter requests for copies of public records. The chapter only requires that the public shall have the right to "examine and copy." Iowa Code section 22.3 states in part: "[s]uch examination and copying shall be done under the supervision of the lawful custodian of the records or the custodian's authorized deputy."

Chapter 22 requires a person seeking public records do more than make a request by letter before that person can complain about the denial of access to the documents. We find that the documents given to Herbert pursuant to White's discretion are not relevant to this appeal. Herbert cannot claim a denial of any right of examination with respect to these documents. Until the day of the hearing when Herbert's attorney appeared in court, neither Herbert nor anyone acting as his agent, had physically appeared before White requesting to examine or copy the documents. Herbert cannot complain about being denied the ability to examine and copy the documents until he has followed the statutory scheme for acquiring access to them.

During trial Herbert withdrew his request for multiple documents. Herbert appeared to concede during the trial that he had no right under Iowa Code chapter 22 to inspect and copy documents created by members of the Johnson County Attorney's office in anticipation of litigation. We find Herbert's withdrawal of his request for these documents also served to withdraw his claim for attorney fees with respect to them.

Before directly addressing the remainder of Herbert's contentions, we note that two of the six documents never given to Herbert are identical copies of a document given to Herbert. The itemized index provided to Herbert noted this fact and we feel confident any dispute over these two documents is simply an oversight. Therefore, we will only discuss the four documents which have never been given to Herbert and which remain in dispute.

All four of the remaining documents were created by members of the county attorney's office. Three of the documents are telephone message slips and the fourth is a slip of paper which had been attached to a document given to Herbert per White's discretion.

Iowa Rule of Civil Procedure 122 (c) states in part: "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

Upon our de novo review of the documents, we agree with the trial court that the documents are attorney work product and therefore excluded from the general provisions of chapter 22.

We affirm the trial court's dismissal of Herbert's writ of mandamus.

AFFIRMED.