

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**NOTICE**

July 29, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 96-1107**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

---

**VERDELL TOLES,**

**PLAINTIFF-APPELLANT,**

**v.**

**ROD LANSER AND GARY J. BARCZAK,**

**DEFENDANTS-RESPONDENTS.**

---

APPEAL from an order of the circuit court for Milwaukee County:  
MICHAEL J. SKWIERAWSKI, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Verdell Toles appeals, *pro se*, from the trial court order denying his petition for a writ of mandamus. We affirm.

In 1991, Toles, an inmate of the Wisconsin prison system, initiated a Wisconsin Open Records Law request to obtain certain court records and related

documents that, he alleged, were in the possession of Milwaukee County Clerk Rod Lanser and Milwaukee County Clerk of Circuit Court Gary J. Barczak. When they did not respond, Toles filed a petition for a writ of mandamus to compel production of the requested documents.

The circuit court quashed the petition when Toles failed to appear for the hearing, even though the circuit court realized Toles was incarcerated and could not appear absent a court order to produce him. We reversed and remanded for a hearing on the factual issues raised by the petition and the returns. *Toles v. Lanser*, No. 92-1793, unpublished slip op. (Wis. Ct. App. July 21, 1994). On remand, the circuit court dismissed Toles's petition, concluding that it lacked personal and subject-matter jurisdiction over Lanser and Barczak because Toles failed to provide proof of service, even though both clerks' offices acknowledged receipt of Toles's petition and were represented by Milwaukee County corporation counsel at the hearing. We reversed again. *Toles v. Lanser*, No. 94-2437, unpublished slip op. (Wis. Ct. App. Dec. 15, 1995).

Following the second remand, the circuit court held a hearing on April 5, 1996. The court heard testimony from John San Filippo, Chief Deputy Clerk of Circuit Court for Milwaukee County, Mark Ryan, Deputy County Clerk for Milwaukee County, Walter Barczak, Register of Deeds for Milwaukee County, Karen Surges, Administrative Assistant II in the Administrative Division of the Milwaukee County Clerk of Courts Office, and from the defendants, Lanser and Barczak. Following the testimony and argument, the court: (1) dismissed the action against Lanser, finding that "at no time relevant to these proceedings or any of these actions was [he] the possessor of any records that were subject to being requested or produced" under the open records law; (2) concluded that Walter Barczak "was never a defendant in this case," and "[e]ven though there may have

been some request made of him, it was never made a part of this case," and that he was "not in possession of any records relating to this request in his office in any way, shape or form;" (3) concluded that although the numerous boxes of files relating to lawsuits against defendant Barczak were subject to the open records law, Toles's request for them "was unreasonable without the payment of the fee" and that ... [i]f Mr. Toles wants to pay the thousands of dollars necessary to produce those thousands of pages, he can pay it and they must be produced;" and (4) Toles was entitled to the documents of his attorneys' applications and affidavits regarding their fees in his criminal cases. Accordingly, the circuit court provided for Toles to receive copies of those last documents. Thus, having granted Toles's request for some of the documents he had requested, and having determined the manner in which Toles would have to obtain any others to which he would be entitled, the circuit court denied the petition for a writ of mandamus.<sup>1</sup>

In reviewing whether a petitioner was entitled to a writ of mandamus to compel production of certain records under Wisconsin's Public Records Law, we explained: "A writ of mandamus is a discretionary writ in that it lies within the sound discretion of the trial court to either grant or deny. An [erroneous exercise] of discretion occurs when the discretionary determination is premised upon an erroneous view of the law." *State ex rel. Lank v. Rzentkowski*, 141 Wis.2d 846, 851, 416 N.W.2d 635, 636 (Ct. App. 1987).

In his brief on this third appeal, Toles comments on numerous aspects of his case and, at times, it is somewhat difficult to discern his precise

---

<sup>1</sup> The circuit court also determined that Toles's success in gaining production of those documents did not constitute "substantial recovery" entitling him to any fees or costs. The court also denied Toles's request for alleged actual damages of one million dollars.

challenges. We will, therefore, address the issues he has specifically articulated in his initial statement of the issues:

1. Whether or not the circuit court abused its authority in refusing to adhere[] to this court order of Dec. 15, 1995 ord[er]ing that case no. 92-CV-002272 be summarily disposed.
2. Whether or not the circuit court abused its authority in ord[er]ing and forcing Petitioner into a second hearing in this case when this court was fulling [sic] aware that all issues[] and questions of law concerning this case had been resolved. There were no material facts at issue.
3. Whether or not the circuit court abused its authority and discretion in demanding Petitioner show cause for the right to call requested witnesses, and the[ir] records to support his claims. Was it a denial of Petitioner[']s right to due process and equal protection of the law?
- 4 Whether or not the circuit court abused its authority and discretion by becoming defense counsel for the defendants.
5. Whether or not the circuit court abused its authority and discretion in twice dismissing Petitioner[']s claim against defendant Lanser before the hearing was over, stating Lanser did not have the requested information.
6. Whether or not the circuit court abused it[s] authority and discretion in denying Petitioner[']s right to due process, and equal protection of the law by denying Petitioner the right to call his witnesses in the order in which Petitioner as counsel prepared to question his witnesses. Was the action of the court prejudicial bias?

(Capitalization and punctuation modified.)

Toles's first two issues are premised on his misunderstanding of this court's most recent remand. Toles argued in the circuit court that this court's December 15, 1995 order stating that "we conclude at conference that this case is appropriate for summary disposition," meant that "all controversy of the issues and

everything else were resolved, that there was no more legal issues to be raised in this matter." As the circuit court correctly explained, however, "summary disposition" in the first paragraph of our decision referred to this court's methodology in addressing Toles's appeal, pursuant to RULE 809.21, STATS., not to the circuit court's procedure on remand. The circuit court correctly held an evidentiary hearing and reached the merits of issues that certainly had not been resolved prior to that hearing.

Toles's third and sixth issues relate to the fact that, initially, testimony was provided by defendants Barczak's and Lanser's subordinates rather than by Barczak and Lanser. At various times during the hearing, Toles protested that the circuit court was denying his right to call Barczak and Lanser. The circuit court repeatedly clarified, however, that it was not denying Toles that opportunity but would later determine whether Barczak and Lanser would be required to appear. As the circuit court pointed out, the order and presentation of witnesses is within the court's discretion under § 906.11, STATS., which, in part, provides:

**(1) CONTROL BY JUDGE.** The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (a) make the interrogation and presentation effective for the ascertainment of the truth, (b) avoid needless consumption of time, and (c) protect witnesses from harassment or undue embarrassment.

Under the circumstances of this case we see no error. The defendants were entitled to call Barczak's and Lanser's subordinates, and the circuit court reasonably waited to see whether Barczak and Lanser still would be needed by either party. Ultimately, both did testify.

Toles's fourth issue reflects his view, consistent with his numerous objections and arguments at the hearing, that the circuit court's questions of witnesses and rulings were allied with the defendants. We have examined the record. We have noted the circuit court's active questioning of several witnesses in the hearing. We have also noted that the questioning focused on the issues and, in some instances, led to answers and rulings in Toles's favor. We see nothing to suggest any effort by the circuit court to act as counsel for the defendants.

Toles's fifth issue reflects his correct understanding that not only did the circuit court dismiss his action against Lanser at the most recent hearing, but it also dismissed the action against Lanser at the September 9, 1994 motion hearing "because he's not the custodian of any of these records under any statute."<sup>2</sup> We see nothing improper in that determination at either hearing. Apparently, and at a rather early stage in the proceedings, the circuit court perceived that Toles had confused the offices and duties of the Milwaukee County Clerk (Lanser) and the Milwaukee County Clerk of Circuit Court (Barczak). Dismissal of Toles's action against Lanser was appropriate.

Toles was improperly denied production of public records for four and one-half years. We understand, therefore, the frustration he must feel in having been required to wait through two successful appeals to finally gain his day in court. We respect his perseverance in vindicating his legal rights. In this last instance, however, the circuit court properly provided some of the records Toles

---

<sup>2</sup> Despite the independent basis on which the circuit court dismissed Toles's action against Lanser on September 9, 1994, our second reversal of the circuit court drew no distinction between that proper basis and the improper basis on which we reversed. Thus, on the second remand, the parties and the circuit understandably treated the case as if Lanser remained a defendant.

had requested, and fairly resolved the issues surrounding the remaining records. Thus, the circuit court did not erroneously exercise discretion in denying Toles's petition for a writ of mandamus.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

