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You are hereby notified that the Court has entered the following opinion and order:

2023AP322

State of Wisconsin ex rel. Ronald W. Wolfe, Jr. v. Susan L. Oppen
(L.C. # 2022CV1725)

Before Blanchard, Graham, and Taylor, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Ronald Wolfe, Jr., appeals pro se from a circuit court order denying his petition for a writ of mandamus seeking to compel Waukesha County District Attorney Susan Oppen to grant his public records request. Based upon our review of the briefs and the record, we conclude at

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2021-22).¹ We affirm.

In his petition, Wolfe alleged that Oppen violated a plain and positive duty under the Wisconsin Public Records Law by denying his request for materials from the prosecution's file in a case in which he was convicted of homicide in 2001. According to Wolfe, the materials in question are exculpatory and relevant to his defense, and the materials consist of the following two items: (1) a page from a September 21, 2000 police report; and (2) correspondence from the victim to the victim's daughter that was turned over to police and referenced in a separate, contemporaneous police report. Wolfe requested that the court issue a writ of mandamus compelling Oppen to provide him with these materials, or alternatively, that the court conduct an *in camera* inspection of the materials.

The circuit court concluded that the prosecution's file is not subject to the Wisconsin Public Records Law under the controlling authority of *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 477 N.W.2d 608 (1991). The court also concluded that Wolfe, as the defendant in the criminal case, has other potential avenues to obtain the material he seeks. The court denied Wolfe's petition without conducting an *in camera* inspection. Wolfe's appeal now follows.

As an initial matter, we note that Wolfe asserts in his reply brief that he has since obtained copies of the materials in question. However, Wolfe has not indicated any desire to dismiss this appeal, and Oppen has not requested dismissal. Accordingly, we proceed to address the merits of Wolfe's arguments.

¹ All references to the Wisconsin Statutes are to the 2021-22 version.

Wolfe contends that the circuit court erred in denying his petition for a writ of mandamus based on *Foust*. We disagree and instead agree with the circuit court that *Foust* is controlling. Our supreme court concluded in *Foust* that “the common law provides an exception [to the Wisconsin Public Records Law] which protects the district attorney’s files from being open to public inspection.” *Foust*, 165 Wis. 2d at 433-34. This exception applies even to “a defendant wanting to see his own file.” *Id.* at 435. Here, the circuit court properly denied Wolfe’s petition for a writ of mandamus based on *Foust*.

Wolfe relies on a different case, *Nichols v. Bennett*, 199 Wis. 2d 268, 544 N.W.2d 428 (1996), to argue the contrary. However, for the reasons we now explain, Wolfe’s reliance on *Nichols* is misplaced.

In *Nichols*, our supreme court clarified that “[a] prosecutor cannot shield documents subject to the [public] records law simply by placing them into a ‘prosecutorial file.’” *Id.* at 274. Rather, as the court explained in *Nichols*, “[i]t is the nature of the documents and not their location” that matters. *Id.* at 274-75. However, the court in *Nichols* also noted that it was not “questioning or weakening” the *Foust* exception, and the court “reaffirm[ed] that documents integral to the criminal investigation and prosecution process are protected ‘from being open to public inspection.’” *Nichols*, 199 Wis. 2d at 275 n.4 (citing *Foust*, 199 Wis. 2d at 434).

Here, we conclude that *Nichols* does not apply to the materials that Wolfe requested from the prosecution’s file because there is no reason to believe that the materials are not integral to the investigation and prosecution process of the case. Indeed, Wolfe affirmatively argues that the materials are exculpatory and relevant to his defense and that they consist of a page from a

police report and correspondence turned over to the police in 2000 when his case was being investigated and prosecuted. As such, the materials are subject to the *Foust* exception.

Wolfe next argues that the circuit court erred by refusing to conduct an *in camera* inspection of the materials. According to Wolfe, the court was required to conduct an *in camera* inspection pursuant to *State ex rel. Morke v. Donnelly*, 155 Wis. 2d 521, 455 N.W.2d 893 (1990), and *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 137 N.W.2d 470 (1965). We disagree. Those cases pertain to a different feature of the Wisconsin Public Records Law under which the court must apply a balancing test to determine whether the harm to the public interest in disclosing a public record outweighs the public's interest in access to the record. *See Morke*, 155 Wis. 2d at 530-31; *Youmans*, 28 Wis. 2d at 682-83. Here, Oppen denied Wolfe's public records request pursuant to the *Foust* exception, not the balancing test, and Wolfe provides no reason to believe that an *in camera* inspection was necessary to determine whether the requested materials fall within the *Foust* exception.²

Finally, Wolfe argues that Oppen waived reliance on the *Foust* exception because she previously provided him with records from the prosecution's file without citing *Foust*. We reject this waiver argument because Wolfe cites no authority to support it. The case that Wolfe cites, *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 279 N.W.2d 179 (1979), imposes a duty on records custodians to specify the public policy reasons for denying a public records request under the balancing test. *See id.* at 427. Here, as we have explained, Oppen relied on the *Foust* exception, not the balancing test, and she cited *Foust* in her letter denying Oppen's request.

² Further, as noted in the text, Wolfe asserts that he has since obtained copies of the materials.

Therefore,

IT IS ORDERED that the circuit court's order is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals