

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 31, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2005AP2150

Cir. Ct. No. 2005CV98

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN EX REL. MARK R. LOWE,

PETITIONER-APPELLANT,

V.

LORI MEYER FRASCHT,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for St. Croix County:
SCOTT R. NEEDHAM, Judge. *Reversed and cause remanded with directions.*

Before Lundsten, P.J., Dykman and Higginbotham, JJ.

¶1 PER CURIAM. Mark Lowe appeals from an order dismissing his petition for a writ of mandamus in which Lowe sought a clear copy of a videotape. The trial court found the copy provided by Lori Meyer Frascht, the St. Croix County Clerk of Court, was “substantially as good as the original” as required by

WIS. STAT. § 19.35(1)(d).¹ Upon our review of the tapes, we conclude that finding is clearly erroneous. *See* WIS. STAT. § 805.17(2). Therefore, we reverse the order and remand with directions to grant the writ and determine the compensable damages Lowe incurred pursuant to WIS. STAT. § 19.37(2).

¶2 Lowe requested a copy of a videotape recording of a traffic stop taken from a state trooper's dashboard camera. Frascht initially denied the request because she lacked the technology to copy the tape. After Lowe filed a petition for a writ of mandamus, Frascht sent Lowe copies² prepared by Deputy Sheriff Kyle Magnus who certified that the copy was substantially as good as the original. Upon receiving the copy, Lowe immediately returned it to Frascht, noting its defects. The trial court found the copy substantially as good as the original, describing the defects as "cosmetic," and ruled that Lowe had not shown a particularized need for a videotape copy more like the original.

¶3 The videotape copy is seriously flawed. On the second tape, which depicts Lowe's traffic stop, approximately every four seconds, for a duration of more than one second, the screen becomes "snowy" and the audio is obscured by a static hissing sound. While we recognize that the quality of a reasonably priced video copy will not have quality identical to the original, the second cassette copy provided to Lowe does not satisfy the requirement of WIS. STAT. § 19.35(1)(d) that the copy must be substantially as good as the original. The second tape

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² For reasons that are not apparent, the original single cassette was copied onto two cassettes. Lowe's traffic stop is recorded on the second copy. We attach no significance to the decision to create a two-cassette copy.

depicting Lowe's arrest is substantially less clear than the first tape which shows unrelated traffic stops.³

¶4 The trial court erroneously considered whether Lowe showed a particularized need for a better copy. The rights created under the open records law are entirely different from a criminal defendant's limited discovery rights. *State ex rel. Young v. Shaw*, 165 Wis. 2d 276, 291, 477 N.W.2d 340 (Ct. App. 1991). A requester under the open records law is not required to state any purpose for the request. WIS. STAT. § 19.35(1)(i). Regardless of the purpose, Lowe is entitled to a copy substantially as good as the original. The record custodian shall provide Lowe with that.

¶5 Lowe requests this court to direct Frascht to provide written transcripts of the audio portion of the tape. He indicates that he was willing to pay for the transcript. The law provides that a custodian "may instead provide a transcript" of an audio recording if requested. WIS. STAT. § 19.35(1)(c). The law does not require the custodian of a record to provide a copy in a format different from the original. Sec. 19.35(1)(L). Therefore, we deny this request.

¶6 Finally, Lowe is entitled to actual damages pursuant to WIS. STAT. § 19.37(2). Frascht argues that she acted in good faith. Compensation for actual damages under § 19.37(2)(a) does not depend on any finding of bad faith. Issues relating to punitive damages authorized by § 19.37(3) must first be presented to the trial court because this court lacks authority to make findings of fact. *See Wurtz v. Fleischman*, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980). Frascht

³ Lowe also complains that the recording of his traffic stop is interrupted by a commercial for the television show *Hard Copy*. That ten-second defect is on the original tape.

argues that Lowe has not presented any proof of damages. Because the trial court dismissed the petition, presentation of evidence on damages would have been premature. A substantial part of Lowe's expenses securing a copy of the videotape were incurred by this appeal. On remand, the trial court shall allow Lowe to present evidence of actual damages caused by Frascht's failure to provide a good copy of the videotape.

By the Court.—Order reversed and cause remanded with directions.

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

