COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2008

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. 2007AP796

Cir. Ct. No. 2006CV12714

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN EX REL. GLENN M. DAVIS,

PETITIONER-APPELLANT,

V.

JOHN T. CHISHOLM, MILWAUKEE COUNTY DISTRICT ATTORNEY,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: JEAN W. DI MOTTO, Judge. *Affirmed.*

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

¶1 PER CURIAM. Glenn Davis appeals from the order of the circuit court that denied his petition for a writ of mandamus. Because we conclude that the circuit court did not err when it denied the petition, we affirm.

¶2 In 1997, Davis pled no contest to four counts of third-degree sexual assault. Subsequently, Davis contacted the Innocence Project at the University of Wisconsin Law School. The Innocence Project investigated his case and sent him a letter in May 2000, which explained that the lab report obtained from the District Attorney showed that "[t]here was no DNA evidence discovered pursuant to the original investigation that could be used to prove that you were not the perpetrator of the sexual assaults." The letter also said that the District Attorney's Office had, pursuant to Department policy, destroyed all evidence and that there was no physical evidence remaining that could be subjected to independent DNA testing. The Innocence Project also said that the District Attorney had sent them the lab report, and they would include the report with other materials they were sending to Davis.

¶3 In October 2002, Davis made an open records request to the District Attorney's Office for a copy of the prosecution file for his case. The District Attorney denied the request, citing to ***State ex rel. Richards v. Foust***, 165 Wis. 2d 429, 477 N.W.2d 608 (1991). In April 2004, Davis brought a petition for a writ of mandamus to the circuit court seeking to compel the District Attorney to produce all of the DNA evidence relevant to his case. The circuit court denied the petition because the evidence had been destroyed.

¶4 In September 2006, Davis made another open records request to the District Attorney demanding a copy of the DNA lab report from the criminal case, as well as $1000 per day as a sanction against the District Attorney for not complying with his request, and $1 million in punitive damages. The District Attorney denied the request because the report was an integral part of the prosecutorial file, and hence was exempt from disclosure under ***Richards***.

¶5 Davis then brought another petition for a writ of mandamus to the circuit court asking the court to compel the District Attorney to provide him with a copy of the report. The circuit court denied the motion. The court stated that it was "appalled" by Davis's petition because "there is no, and never will be any, DNA evidence." The court further found that Davis knew or should have known that the evidence did not exist. It is from this order that Davis appeals.[1]

¶6 The State argues that the circuit court properly denied the petition because the District Attorney did not have any duty to provide Davis with a copy of a DNA lab report that was in its prosecutorial file. Prosecutors have a right not to disclose prosecutorial files. ***Id.*** at 437. A document is not automatically exempt merely because a prosecutor places it in a file. ***Nichols v. Bennet***, 199 Wis. 2d 268, 274, 544 N.W.2d 428 (1996). Rather, the exemption from public disclosure applies to documents that are integral to the criminal investigation and process. ***Id.*** at 275 n.4. In this case, the DNA lab report was certainly an integral part of the criminal process. As such, the District Attorney did not have a duty to disclose it, and the circuit court properly denied the petition for a writ of mandamus. Further, to the extent that Davis is attempting to obtain other DNA evidence, he has been repeatedly told that there is no evidence in existence. We will not compel someone to produce something that does not exist.

[1] Davis's brief is very difficult to follow. He appears to be arguing a variety of claims including ineffective assistance of counsel. The petition he filed in the circuit court, however, demanded a copy of the DNA report, and did not raise any other issues. To the extent Davis is raising new arguments, the court will not consider arguments that were not raised before the circuit court. *See* ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).