

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 17, 1996

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.

NOTICE

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

No. 95-2654-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

OMOWALE NUBIAN BLACK,

Plaintiff-Appellant,

v.

ELEANOR SWOBODA,

Defendant-Respondent.

APPEAL from an order of the circuit court for Dane County:
DANIEL R. MOESER, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Paul C. Gartzke, Reserve
Judge.

PER CURIAM.¹ Omowale Nubian Black appeals from an order dismissing his public records mandamus action. The issues are whether the

¹ This is an expedited appeal under RULE 809.17, STATS.

trial court erroneously exercised its discretion in dismissing this action for failure to prosecute, and whether the trial court erred in denying Black's request for costs, fees and damages under § 19.37(2), STATS. We conclude that the trial court properly exercised its discretion in dismissing the action for Black's failure to prosecute and properly denied Black's request for costs, fees and damages. Therefore, we affirm.

Black submitted a public records request to Eleanor Swoboda, the Department of Corrections Deputy Legal Custodian, for a videotape of his August 1992 cell extraction and all related incident and conduct reports.² After waiting over eight months for a response, Black filed a mandamus action. In her answer, Swoboda admitted that she had forgotten about the request, and produced certain incident reports³ and Black's conduct reports and related records.⁴ She refused to produce the videotape for security reasons, but advised Black's counsel that he could watch the videotape at the Columbia Correctional Institution.⁵

Other than moving to amend the pleadings to reflect his recent name change, Black took no action until seven months later, when he objected to the trial court's placement of this case on its dismissal calendar.⁶ He claimed that he would move for an alternative mandamus order within ten days. He did not do so. Four months after Black's objection, and almost one year after the action was filed, Swoboda moved for dismissal for failure to prosecute.⁷ *See* §

² Black also requested various records relating to those conduct reports.

³ Swoboda produced only the incident reports which specifically related to Black. *See* § 19.35(1)(am), STATS.

⁴ This mandamus action was unnecessary to produce most of these records because they had previously been given to Black.

⁵ The Department of Corrections' policy precludes providing requesters with a copy of the tape to prevent an analysis of the correctional institution's security precautions, procedures and capabilities.

⁶ Black's February 14, 1995 correspondence objecting to dismissal of this action is not in the appellate record. However, the substance of that correspondence is summarized in the affidavit of defendant's counsel supporting dismissal.

⁷ Only then did Black move for an alternative mandamus order.

805.03, STATS. At the hearing on Swoboda's dismissal motion, Black orally requested costs, fees and damages under § 19.37(2), STATS.⁸ The trial court denied that request and dismissed the action for failure to prosecute under § 805.03, STATS.

We review a judgment of dismissal for failure to prosecute for an erroneous exercise of discretion. *Johnson v. Allis Chalmers Corp.*, 162 Wis.2d 261, 273, 470 N.W.2d 859, 863 (1991). Here, the record evidences inactivity. Black provides no reason for his one-year delay in seeking an alternative mandamus order. Without a transcript of the hearing, we must assume that every fact essential to the trial court's exercise of discretion is supported by the record. *Austin v. Ford Motor Co.*, 86 Wis.2d 628, 641, 273 N.W.2d 233, 239 (1979). We will make that assumption.⁹

At the hearing on Swoboda's dismissal motion, Black orally requested costs, fees and damages under § 19.37(2), STATS.¹⁰ Our review of the trial court's denial of that request is dependent on statutory construction, which we review as a question of law. *Racine Educ. Ass'n v. Racine Bd. of Educ.*, 129 Wis.2d 319, 325, 385 N.W.2d 510, 512 (Ct. App. 1986).

To recover costs and fees, Black must demonstrate that he prevailed in "substantial part," namely, that the mandamus action could

⁸ He did not file a motion. See § 802.01(2), STATS.

⁹ Black contends that he was denied procedural due process of law because he was never notified of "[the trial court's] standards for identifying impermissible delay." Black contends his case is on point with *Rupert v. Home Mut. Ins. Co.*, 138 Wis.2d 1, 405 N.W.2d 661 (Ct. App. 1987). We disagree. In *Rupert*, we held that the trial court's unanticipated *sua sponte* dismissal of the action violated due process. *Id.* at 8-9, 405 N.W.2d at 663-64. The trial court in Black's case removed the case from its dismissal calendar upon receipt of Black's objection. At that time, Black represented that he would seek an alternative mandamus order within ten days. However, he did not honor that representation. Four months later, Swoboda served Black with a motion delineating her dismissal theory for failure to prosecute. The trial court granted Swoboda's dismissal motion one month later. Black has not shown a denial of procedural due process of law.

¹⁰ We are not persuaded that the trial court erred when it denied a request that was not reduced to writing and noticed, as required by § 802.01(2), STATS.

reasonably be regarded as necessary to obtain the records. Section 19.37(2)(a), STATS.; *Eau Claire Press Co. v. Gordon*, 176 Wis.2d 154, 160, 499 N.W.2d 918, 920 (Ct. App. 1993). Black requested three categories of records: (1) the videotape; (2) incident reports; and (3) his conduct reports. The only records produced which Black had not previously received were approximately seven pages of incident reports, all of which contained personally identifiable information. See § 19.35(1)(am), STATS.¹¹ Black did not pursue Swoboda's refusal to produce the other incident reports, although he belatedly moved for an alternative mandamus order for production of the videotape. However, the action was dismissed, which rendered the belated motion moot.

The only records produced that Black did not already have were seven pages of incident reports and his attorney's right to view the videotape. Black's entire argument is that because he did not receive these records until he filed his action, mandamus was necessary. However, the "allegedly prevailing [requester] must assert something more than *post hoc, ergo propter hoc*." *Racine*, 129 Wis.2d at 326, 385 N.W.2d at 512. Furthermore, by seeking an alternative mandamus order to obtain the videotape, Black admitted that he had not prevailed. The alleged result of this mandamus action was production of seven pages of incident reports, which Black has not demonstrated have any significance, and a response regarding the videotape, which Black has asserted is inadequate. Black has not persuaded us that he has prevailed in substantial part. He is not entitled to costs or fees.

By the Court. – Order affirmed.

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

¹¹ Section 19.37(2)(b), STATS., provides actual damages for a violation of § 19.35(1)(am), STATS., upon a showing that the refusal was wilful or intentional. The only information in the record on Swoboda's refusal is her answer in which she claims that she forgot about the request. Because there is no evidence that her refusal was wilful or intentional, we deny the request for actual damages for the personally identifiable information Black sought.