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November 27, 2019

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

2018AP2379 Martin Hying v. Dean Stensberg (L.C. # 2018CV1605)

Before Fitzpatrick, P.J., Blanchard and Graham, 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).

Martin Hying, pro se, appeals a circuit court order that denied Hying's petition for a writ of mandamus to compel disclosure of memoranda written by Wisconsin Supreme Court commissioners in connection with Hying's petitions for review in three cases. Hying contends that he is entitled to the memoranda under Wisconsin's public records law and that the court was required to conduct an in-camera inspection of the memoranda before issuing a decision. Based

upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] We summarily affirm.

Hying filed a public records request under WIS. STAT. §§ 19.21 to 19.39 with the office of supreme court commissioners, seeking the commissioners' memoranda to the justices in three appeals. The records custodian denied the request. The custodian explained that the commissioners' memoranda to the justices were not subject to disclosure under ***State v. Panknin***, 217 Wis. 2d 200, 579 N.W.2d 52 (Ct. App. 1998), which held that a judge's personal judicial work product is not subject to disclosure. The custodian also explained that the public interest in allowing the court to confer with colleagues outweighed the public interest in access.

Hying filed a petition for a writ of mandamus to compel disclosure. Hying argued that he is entitled to the court commissioners' recommendations to the justices in the petitions for review that Hying filed in the supreme court in the three appeals. He argued that ***Panknin*** does not apply because it addressed a judge's personal notes, not memoranda from court commissioners to the court. Hying requested that the circuit court conduct an in-camera inspection of the memoranda. Counsel for the records custodian initially indicated that counsel did not object to an in-camera inspection, although counsel stated that she did not know if that were necessary because the custodian took the position that the memoranda were not subject to disclosure. The court set a briefing schedule and stated that, if the records custodian were not adverse to in-camera inspection, it could file the memoranda for in-camera inspection along with its brief. Hying asked whether that meant that the court would review the memoranda, and the court

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

indicated that the records custodian would file them under seal. However, rather than submit the memoranda, the records custodian moved for summary judgment on grounds that the memoranda were not subject to disclosure. The court granted summary judgment to the records custodian, and denied Hying's petition for a writ of mandamus.

Our review of a circuit court's decision granting summary judgment is de novo. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). Where, as here, a circuit court determines a petition for writ of mandamus by interpreting the public records law and applying that law to undisputed facts, our review is also de novo. ***ECO, Inc. v. City of Elkhorn***, 2002 WI App 302, ¶15, 259 Wis. 2d 276, 655 N.W.2d 510. A writ of mandamus compelling disclosure of public records will issue only if the petitioner has a clear legal right to the records; the records custodian has a plain legal duty to disclose the records; the petitioner will suffer substantial damages if the records are not disclosed; and the petitioner has no other adequate remedy at law. ***Watton v. Hegerty***, 2008 WI 74, ¶8, 311 Wis. 2d 52, 751 N.W.2d 369.

Under WIS. STAT. § 19.35(1)(a), public records must be disclosed upon request unless there is a statutory exemption, common-law limitation, or overriding public policy against disclosure. *See* ***Seifert v. School Dist. of Sheboygan Falls***, 2007 WI App 207, ¶¶15, 26, 305 Wis. 2d 582, 740 N.W.2d 177. Here, the records custodian identified ***Panknin*** as setting forth a common-law limitation to disclosure of documents prepared in the course of a court's decision-making process. Hying contends that ***Panknin*** is distinguishable because it addressed a judge's personal notes, not memoranda prepared by other court employees for review by a judge or

justice. He contends that ***Panknin*** does not establish that supreme court commissioners' memoranda to the justices are exempt from disclosure. We disagree.

In ***Panknin***, 217 Wis. 2d at 206-16, we held that a judge's personal sentencing notes were not subject to disclosure upon request by the defendant. In reaching that conclusion, we relied on case law addressing appellate review of the court's exercise of discretion at sentencing, the public records law regarding "access to personal notes, memos and documents created by public employees subject to the provisions of the law," and "[t]he nature of the judicial decision-making process." ***Id.*** at 207.

First, as to the court's discretion, we concluded that "the defendant cannot seek to mount a fishing expedition through the court's personal notes. Rather, the defendant is limited to searching the official record for evidence that the trial court erroneously exercised its discretion." ***Id.*** at 208.

As to public records, we described a judge's personal notes as "a voluntary piece of work completed by the trial court for its own convenience and to facilitate the performance of its duties." ***Id.*** at 212. We explained that "the personal notes would not have to be disclosed under Wisconsin [public] records law because disclosure would impede the work habits of the trial court" by precluding judges from committing their thoughts to writing. ***Id.*** We said that preventing disclosure of judges' notes would not contravene the policy behind the public records law because "[t]he court record and the verbatim transcript of all court proceedings are the most accurate sources of information on the operation of the trial court and the court's performance of its official duties and acts." ***Id.*** at 213.

Finally, we stated that "[t]he very nature of the decisional process demonstrates why a litigant cannot have access to the personal notes of a trial court." ***Id.*** We adopted the reasoning of the California Court of Appeals that "'much written material is created inside the courthouse'" that does not fit into the category of material "in which the public has a justifiable interest." ***Id.*** at 213-15 (quoted source omitted). "'The craft of the lawyer, judge and clerk involves important but elusive concepts, such as logic, justice, equity and the rule of law; however, the physical manifestation of these ideas is the written word.'" ***Id.*** at 214 (quoted source omitted). Thus, "whether at the trial court or the court of appeals, there is a great deal of material that is created during the judicial workday for the purpose of carrying out judicial duties that should not be subject to public scrutiny." ***Id.*** We concluded that "[i]t is only the final reasoning process which judges are required to place on the record that is representative of the performance of judicial duties," and "that access to a court's notes would significantly disrupt the judicial decisional process." ***Id.*** at 216.

Here, the records custodian's motion for summary judgment included an affidavit by a supreme court commissioner averring that petitions for review are assigned to court commissioners, and that the court commissioners prepare memoranda to the court to assist the justices in deciding whether to grant the petitions. The affidavit also averred that, if the memoranda were not kept confidential, the court commissioner would likely be more guarded and less candid in her recommendations, which she believed "would significantly hamper the efficiency of the Court's processing of certifications and petitions." Under ***Panknin***, the supreme court commissioner memoranda are exempt from disclosure as "material that is created during the judicial workday for the purpose of carrying out judicial duties," as opposed to "[t]he court record and the verbatim transcript of all court proceedings" that are open to scrutiny. ***Id.*** at

213-14. Accordingly, the records custodian properly denied Hying's public record request under WIS. STAT. § 19.35(1)(a).

Next, Hying argues that he is entitled to the records under WIS. STAT. § 19.35(1)(am) because they contain "personally identifiable information." The State responds that Hying has forfeited this argument by failing to raise it in the circuit, *see* ***Finch v. Southside Lincoln-Mercury, Inc.***, 2004 WI App 110, ¶42, 274 Wis. 2d 719, 685 N.W.2d 154, and also that he is not entitled to the records under the statutory exemption for material maintained in connection with a court proceeding, *see* § 19.35(1)(am)1. In reply, Hying does not point to record evidence that he specifically raised this argument in the circuit court, instead arguing that it was encompassed in his public records request because he cited to all of WIS. STAT. §§ 19.21 to 19.39. Hying also argues that the exemption under § 19.35(1)(am)1. does not apply because the supreme court has already denied his petitions for review. Hying asserts that the exemption does not apply when, as here, there are no circumstances that may lead to a future action.[2]

We are not persuaded that Hying's general reference to the entire public records law in his public records request adequately preserved this argument for appeal. *See* ***Shadley v. Lloyds of London***, 2009 WI App 165, ¶26, 322 Wis. 2d 189, 776 N.W.2d 838 ("'The party alleging error has the burden of establishing, by reference to the record, that the error was raised before the trial court.'" (quoted source omitted)). However, even if this issue were properly preserved

[2] Hying asserts in conclusory fashion that exempting the supreme court commissioners' memorandum under WIS. STAT. § 19.35(1)(am)1. unconstitutionally denies a requestor due process. We decline to address this undeveloped constitutional argument. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

for review, we conclude that Hying is not entitled to the memoranda under WIS. STAT. § 19.35(1)(am)1.

If a requester is not entitled to a record under WIS. STAT. § 19.35(1), he or she may still be entitled to the record under § 19.35(1)(am) if it contains "'personally identifiable information pertaining to the individual.'" ***Seifert***, 305 Wis. 2d 582, ¶35 (quoting § 19.35(1)(am)). However, the individual is not entitled to the record if a statutory exemption applies. ***Id.*** One exemption is if the record "is collected or maintained in connection with a complaint, investigation or other circumstance that may lead to an enforcement action, administrative proceeding, arbitration proceeding or court proceeding, *or any such record that is collected or maintained in connection with such an action or proceeding*." Sec. 19.35(1)(am)1. (emphasis added). Here, the memoranda fall within the exemption for material that was collected or maintained in connection with a court proceeding. There is no requirement under § 19.35(1)(am)1. that the court proceeding be current. *See* ***Seifert***, 305 Wis. 2d 582, ¶36. Accordingly, they are not subject to disclosure.

Finally, Hying argues that the circuit court erred by failing to conduct an in-camera review of the memoranda. He argues that the court was required to conduct an in-camera review under ***State ex rel. Youmans v. Owens***, 28 Wis. 2d 672, 682, 137 N.W.2d 470 (1965) (if records custodian denies record request on public interest grounds and the requester brings a court action for disclosure, "the proper procedure is for the trial judge to examine in camera the record …. [and] then make [a] determination of whether or not the harm likely to result to the public interest by permitting the inspection outweighs the benefit to be gained by granting inspection" (italics omitted)). The State responds that an in-camera inspection is not required when, as here, the record is protected by virtue of its general characteristics, not its specific contents. *See*

Village of Butler v. Cohen, 163 Wis. 2d 819, 827, 472 N.W.2d 579 (Ct. App. 1991) (in-camera review not required to establish police personnel files were not subject to disclosure under public records law because "[t]he issue … [was] not the contents of the[] particular officers' personnel files, but the personnel files of police officers in general"). Hying replies that the content of the memoranda are at issue and that an in-camera inspection is required.[3]

We conclude that the circuit court properly denied Hying's mandamus action without conducting an in-camera review of the records. As the court noted, nothing about the contents of the memoranda is relevant to whether they are subject to disclosure under the public records law. Rather, as explained above, the memoranda are not subject to disclosure based on the nature of the records.

Therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals

[3] Hying also contends that the State forfeited its argument against an in-camera inspection by initially indicating to the circuit court that it did not oppose the request, and then changing its position at a later hearing. However, Hying does not cite any authority for that proposition. Forfeiture generally applies when a party fails to raise an issue in the circuit court, and then attempts to raise the issue on appeal. *See* ***Finch v. Southside Lincoln-Mercury, Inc.***, 2004 WI App 110, ¶42, 274 Wis. 2d 719, 685 N.W.2d 154. Here, we are not persuaded that the State was prohibited from changing its position in the circuit court as to whether it opposed an in-camera inspection.