STATE OF MICHIGAN

COURT OF APPEALS

G. RICHARD MEACHAM,

Plaintiff-Appellant,

V

WILLARD L. MARTIN and CITY OF MARQUETTE,

Defendants-Appellees.

UNPUBLISHED
June 7, 2002

No. 233384
Marquette Circuit Court
LC No. 00-037228-NO

Before: Griffin, P.J., and Hood and Sawyer, JJ

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition in favor of defendants. This case arose when defendant Willard Martin, attorney for defendant City of Marquette, pursuant to a Freedom of Information Act (FOIA) request, released plaintiff's personnel file and other documents relating to allegations of misconduct by plaintiff while he was employed in the Marquette Police Department. Plaintiff sued to prevent disclosure of the documents and, after the trial court dismissed his complaint, filed a motion for reconsideration and a supplemental motion for reconsideration, raising the issue whether disclosure of the documents would deprive him of a fair trial in another action in federal court in Illinois. The trial court denied both motions for reconsideration. We affirm.

Although plaintiff claimed an appeal from the trial court's original order granting summary disposition, the "fair-trial" question presented in this appeal was not raised until he filed the supplemental motion for reconsideration. Where a plaintiff does not challenge a summary disposition motion on the grounds raised on appeal, the claim has not been preserved for appeal. *Gordin v William Beaumont Hosp*, 180 Mich App 488, 494; 447 NW2d 793 (1989). However, plaintiff did raise the "fair-trial" issue in his supplemental brief in support of his motion for reconsideration and in the oral arguments on the supplement. Moreover, this Court may consider the issue because it involves an issue of law and the facts necessary to its resolution have been presented. *Poch v Anderson*, 229 Mich App 40, 52; 580 NW2d 456 (1998).

Where a party appeals on the basis of a mistake by the trial court that was not objected to on the record below, this Court reviews the record for plain error. *Kern v Blethen-Coluni*, 240 Mich App 333, 335-336; 612 NW2d 838 (2000). To avoid forfeiture under the plain error rule, three requirements must be met: (1) the error must have occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights. *Kern, supra* at 335-336. This

Court reviews statutory interpretations de novo as questions of law. *Pittsfield Charter Twp v Washtenaw Co*, 246 Mich App 356, 360; 633 NW2d 10 (2001).

The disclosure of information in Michigan government records is controlled by its FOIA, MCL 15.231 *et seq.*, which sets forth the public policy of this state as follows:

> [A]ll persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. [MCL 15.231.]

Consistent with this broadly declared legislative policy, the FOIA's specific provisions generally require the full disclosure of public records in the possession of a public body. *Herald Co v City of Bay City*, 463 Mich 111, 119; 614 NW2d 873 (2000). The FOIA provides Michigan citizens with broad rights to obtain public records, limited only by the coverage of the statute and its exemptions. *Kent Co Deputy Sheriff's Ass'n v Kent Co Sheriff*, 463 Mich 353, 362; 616 NW2d 677 (2000).

Plaintiff argues that an exemption found in §13 of the FOIA, MCL 15.243, applies in this case. On its express terms, the FOIA is a pro-disclosure statute and the exemptions stated in §13 are narrowly construed. *Herald Co, supra* at 119. The relevant portions of that statute read as follows:

> (1) A public body may exempt from disclosure as a public record under this act:
>
> * * *
>
> (b) Investigating records compiled for law enforcement purposes, but only to the extent that disclosure as a public record would do any of the following:
>
> * * *
>
> (ii) Deprive a person of the right to a fair trial or impartial administrative adjudication. [MCL 15.243.]

The law enforcement exemption contained in §13(1)(b) is not limited in application to police investigations of criminal matters. *Yarbrough v Dep't of Corrections*, 199 Mich App 180, 185; 501 NW2d 207 (1993). In *Yarbrough*, the documents sought were prepared during an ongoing investigation into illegal acts, which investigation could possibly have resulted in civil or criminal action. *Id*. The *Yarbrough* Court agreed with the trial court that the investigation, initiated by the filing of a sexual harassment complaint with the Equal Employment Opportunity Office, was for the purpose of enforcing the laws of the State of Michigan, including its criminal laws and those laws that prohibit sexual harassment in the workplace. *Id*. Having concluded that the investigation was for law enforcement purposes and that the documents were compiled for those purposes, the *Yarbrough* Court held that the records were exempt from disclosure while the investigation was ongoing. *Id*.

The records challenged by plaintiff here were compiled as part of an internal police department investigation of plaintiff. There is nothing on the record to show that a sexual harassment complaint was ever filed with any Michigan agency or that charges were ever filed against plaintiff. Crucially, the *Yarbrough* opinion said nothing about the applicability of the § 13(1)(b) exemption after an investigation is complete, and *Ballard v Dep't of Corrections*, 122 Mich App 123; 332 NW2d 435 (1982), stated in dicta that the exemptions contained in § 13(1)(b)(i) expire at the end of the law enforcement proceedings. *Id*. at 127. The investigation documented by the records plaintiff seeks to suppress was completed in 1981, when he was allowed to resign, over twenty years ago. Thus, there is no clear support for the position that the records are "investigation records compiled for law enforcement purposes," and, even if they are, they are not exempt from disclosure because the investigation is long since over.

Even assuming arguendo that the records do qualify as exempt under § 13, the question of whether disclosure would deny plaintiff the right to a fair trial in Illinois must be answered in the negative. Plaintiff provided no authority setting forth a statutory or judicial standard by which it is determined whether disclosure of documents exempted from the FOIA under § 13 will result in the deprivation of the right to a fair trial. However, the trial court addressed this issue at some length, giving consideration to the potential effect of the documents on the federal court proceedings. It noted that the information contained in the records was subject to the admissibility requirements of federal court, and that it was the responsibility of the federal court to make evidentiary rulings that would protect plaintiff's right to a fair trial. It noted that plaintiff would be protected from a tainted jury (due to public dissemination of the information) by the jury selection process in federal court and that release of the documents would not render it impossible for plaintiff to obtain an impartial jury. It noted other procedural protections invoked in high publicity cases, such as venue changes, that would protect plaintiff's right to a fair and impartial jury. Crucially, at the time it made its ruling, the trial court was apprised of the fact that the federal court in Illinois had already issued a protective order restricting the release of the documents.

Because it is not patently clear that the documents are investigation records compiled for law enforcement purposes, that they are exempt from the disclosure requirements of the FOIA, or that their disclosure will deprive plaintiff of his right to a fair trial, there was no plain error by the trial court in deciding that the documents should be disclosed. Further, even if there had been plain error, it would not have affected plaintiff's substantial rights. The disclosure of the records itself does not per se deprive plaintiff of his right to a fair trial, only the disclosure coupled with a failure by the federal court to protect his right would amount to a substantial deprivation. The federal court had already issued a protective order restricting the release of the documents when plaintiff argued his supplemental motion for reconsideration. Thus, plaintiff's substantial rights were not affected.

Similarly, under the de novo standard called for in *Pittsfield Twp*, *supra* at 360, the trial court did not err. As noted, the records that plaintiff wishes to suppress are not clearly investigation records compiled for law enforcement purposes under MCL 15.243, and even if they were, they were not protected once the investigation was completed. *Yarbrough*, *supra* at 185. Further, even if some interpretation of MCL 15.243 did compel the conclusion that the records were exempt from disclosure, plaintiff will not be deprived of his right to a fair trial simply by their disclosure because the federal court has already taken steps to protect that right.

It was not error for the trial court to determine that plaintiff would not be deprived of a fair trial if the records were disclosed.

Affirmed.

/s/ Richard Allen Griffin
/s/ Harold Hood
/s/ David H. Sawyer