Cite as 2011 Ark. App. 385

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA10-876

		Opinion Delivered May 25, 2011
CONNIE WATKINS	APPELLANT	APPEAL FROM THE GREENE COUNTY CIRCUIT COURT, [NO. CIV-2010-103 (JF)]
V.		HONORABLE RALPH WILSON, JR., JUDGE
KIMBERLY DALE	APPELLEE	REVERSED AND REMANDED

RITA W. GRUBER, Judge

This case arises out of appellant Connie Watkins's August 2007 conviction in district court for disorderly conduct, which was affirmed on de novo appeal to circuit court and on appeal to this court. *Watkins v. State*, 2010 Ark. App. 85, ___ S.W.3d ___. Appellee Kimberly Dale is the Deputy City Attorney for Paragould and served as the Greene County deputy prosecutor during appellant's trials. On March 26, 2010, appellant filed a pro se petition and complaint against appellee pursuant to the Arkansas Freedom of Information Act (FOIA), Ark. Code Ann. §§ 25-19-101 et seq. (Supp. 2009). While admitting that appellee allowed her to inspect all records pertaining to her case and that appellee provided copies of documents that she requested, appellant alleged in her petition that appellee violated FOIA by failing to provide copies of "[e]xculpatory handwritten notes." She also alleged that appellee's informing her that appellee was not required to provide work product and personal notes was a violation

of FOIA. The trial court dismissed the petition, and appellant brought this appeal. We reverse and remand for a hearing.

Appellant contends in her petition and on appeal that she made a detailed FOIA request on September 15, 2009, for information relating to various cases surrounding her disorderly-conduct conviction. Appellee responded to the request, stating that the information had been made available by other parties under previous FOIA requests. Appellee also said that if appellant felt she still had not received certain items that they could arrange a time for her to inspect appellee's file. On September 23, 2009, appellant inspected appellee's file relating to appellant's conviction. Appellee explained that appellant could look at the entire file and tag the items she wanted copied (including any work product), but she told appellant that she was not required to provide work product and her own notes pertaining to the trial. Appellant admits that appellee copied all of the tagged documents and provided them to appellant except for certain allegedly "[e]xculpatory handwritten notes" contained in the file.

Appellant insisted in a March 7, 2010, letter to appellee that she provide to appellant all records and notes, "including personal notes and your work product." Appellant's March request included requests for explanations and records to support various statements appellee made in trial, presumably in her statements or arguments to the court; records of discussions with various witnesses; information about the basis for appellee's decision to prosecute appellant; appellant's arrest report and interviews with the police department; notes from meetings possibly held regarding her criminal case; and information from discussions with co-

counsel about appellant's case. Appellee responded that her decision to prosecute was based on previously provided information and her understanding of the criminal statutes and that the information had already been provided by her office or by the police department, the city, or the municipal league through past FOIA requests. Not satisfied, appellant filed a petition and complaint against appellee with the Greene County Circuit Court.

Appellant's petition set forth in great detail alleged testimonial statements and statements of appellee from appellant's criminal trial. She alleged that these statements "indicated existence of documents or statements" to support these statements and that she was entitled to these alleged supporting documents in her FOIA request. She detailed her FOIA request and stated that appellee allowed her to view all of appellee's records from her criminal trial but alleged that the information made available to her did not contain "incriminating evidence" or support for the prejudicial statements made by witnesses and appellee in her trial or any basis for appellee's decision to prosecute her. She also alleged that the copies she received did not contain the "[e]xculpatory handwritten notes" which she had tagged during her review of appellee's file. Finally, appellant asked the court to require appellee to produce these documents or produce an affidavit stating that the items she requested did not exist.

Appellee filed an answer and alleged twelve affirmative defenses, including that appellant failed to state a claim for which relief could be granted under Ark. R. Civ. P. 12(b)(6), that appellant was not deprived of any right or interest protected under FOIA, and that appellee had complied with the provisions of FOIA. The trial court informed the parties

that it was treating appellee's affirmative defenses as a motion to dismiss and gave appellant twenty days to respond. The court later extended the deadline at appellant's request. Appellant responded, and on June 3, 2010, without a hearing, the court dismissed appellant's petition. The court found that appellant had been provided with a complete copy of the two-volume transcript of her criminal trial in circuit court and that appellee had fully complied with appellant's FOIA request to her. Therefore, the court determined, the case was moot. The court further found that appellant's pleadings and responses filed in response to appellee's motion to dismiss were "without merit, frivolous, and irrelevant" and that appellant had already received the relief to which she was entitled. The court then noted that it perceived appellant to be a dissatisfied criminal defendant who disagreed with her conviction.

Appellant contends on appeal that the circuit court erred in dismissing her petition, that the court did not properly apply FOIA, and that she was entitled to a hearing. When reviewing a circuit court's order granting a motion to dismiss pursuant to Rule 12(b)(6), we treat the facts alleged in the complaint as true and view them in the light most favorable to the plaintiff. *Biedenharn v. Thicksten*, 361 Ark. 438, 206 S.W.3d 837 (2005). In viewing the facts in the light most favorable to the plaintiff, the facts should be liberally construed in the plaintiff's favor. *Id.* Our rules require fact pleading, and a complaint must state facts, not mere conclusions, in order to entitle the pleader to relief. *Id.* Our standard of review for the granting of a motion to dismiss is whether the circuit court abused its discretion. *Doe v. Weiss*, 2010 Ark. 150, at 4.

FOIA states that "[e]xcept as otherwise specifically provided by [FOIA] or by laws specifically enacted to provide otherwise, all public records shall be open to inspection and copying by any citizen of the State of Arkansas during the regular business hours of the custodian of the records." Ark. Code Ann. § 25-19-105(a)(1)(A). FOIA does not require a custodian to "compile information or create a record in response to a request made." Ark. Code Ann. § 25-19-105(d)(2)(C).

Appellant admits in her petition that appellee made her file available for inspection and provided copies of all documents except certain of appellee's handwritten notes. Appellant's argument is that she was entitled to the work product, including these handwritten notes, and that she was entitled to documents or reports explaining the basis for certain statements made by witnesses and appellee in appellant's criminal trial. With regard to her request for appellee to provide statements or reports explaining the basis for testimony in trial, appellant is simply mistaken. FOIA requires no such thing. Appellant cites no provision in FOIA that requires a prosecutor to create reports about her mental impressions, purposes, or motivations in pursuing a conviction or reports speculating about the mental impressions, purposes, or motivations of trial witnesses. Indeed, FOIA specifically provides that a custodian is not required to "compile information or create a record in response to a request made." Ark. Code Ann. § 25-19-105(d)(2)(C).

With regard to the alleged "[e]xculpatory handwritten notes," however, we remand for a hearing. FOIA provides that "[u]pon written application of the person denied the rights

provided for in this chapter, or any interested party, it shall be mandatory upon the circuit court having jurisdiction to fix and assess a day the petition is to be heard within seven (7) days of the date of the application of the petitioner, and to hear and determine the case." Ark. Code Ann. § 25-19-107(b). Although appellant requested a hearing in her petition, the court never held one. In its order dismissing appellant's petition, the court found that all documents requested had been provided and that FOIA did not require custodians to create records or answer questions in response to a request but only to make existing records available for inspection and copying. The court did not mention the allegedly "[e]xculpatory handwritten notes" that appellee did not provide to appellant nor make a finding regarding why they did not fall within FOIA's ambit. Having not reviewed these notes, we do not know if they do or do not. Therefore, we reverse and remand for the trial court to hold a hearing and conduct an *in camera* review of these handwritten notes to determine if they fall within one of the exceptions from FOIA set forth in Ark. Code Ann. § 25-19-105(b). If they do not, appellee must provide appellant with copies of the handwritten notes.

Reversed and remanded.

GLOVER and HOOFMAN, JJ., agree.