Mark Pettit, appellee, v. Nebraska Department of Correctional Services and Frank Hopkins, appellants.

867 N.W.2d 553

Filed August 7, 2015. No. S-14-676.

1. **Declaratory Judgments.** An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
2. **Statutes.** Statutory interpretation presents a question of law.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
4. **Declaratory Judgments: Appeal and Error.** In a declaratory judgment action treated as an action at law, an appellate court does not disturb factual determinations unless they are clearly wrong.
5. **Prisoners: Records: Good Cause: Appeal and Error.** Whether a person seeking access to an inmate's institutional file under Neb. Rev. Stat. § 83-178 (Reissue 2014) shows good cause is a mixed question of law and fact. What the parties show presents questions of fact, which an appellate court reviews for clear error. Whether the showing establishes good cause is a question of law, and an appellate court reviews questions of law independently. Where the facts are undisputed, the entire question becomes one of law.
6. **Statutes: Legislature: Intent: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court's duty in discerning the meaning of a statute is to determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
7. **Statutes: Actions: Legislature: Intent.** Whether a statute creates a private right of action depends on the statute's purpose and whether the Legislature intended to create a private right of action.

8. **Prisoners: Records: Good Cause: Legislature: Intent: Words and Phrases.** For purposes of Neb. Rev. Stat. § 83-178(2) (Reissue 2014), "good cause" means a logical or legally sufficient reason in light of all of the surrounding facts and circumstances and in view of the very narrow access intended by the Legislature.

Appeal from the District Court for Lancaster County: Steven D. Burns, Judge. Reversed and remanded with directions.

Jon Bruning, Attorney General, and James D. Smith for appellants.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., L.L.O., for appellee.

Heavican, C.J., Wright, Connolly, McCormack, Miller-Lerman, and Cassel, JJ.

Cassel, J.

INTRODUCTION

The district court determined that Mark Pettit showed "good cause"[1] for public inspection and reproduction of an executed inmate's drawings placed by the Nebraska Department of Correctional Services (DCS) in the inmate's institutional file. DCS and Frank Hopkins appeal. We first settle the standard of appellate review, reviewing the factual findings for clear error and the existence of good cause as a question of law. We then examine the entire statute, recognizing its emphasis of confidentiality rather than openness. Finally, we define the phrase in view of the entire statute. We conclude that the undisputed facts present a question of law and that Pettit failed to demonstrate a legally sufficient reason for inspection of the drawings.

BACKGROUND

Pettit, a former anchorman and investigative reporter for an Omaha, Nebraska, television station, reported on the murders

[1] See Neb. Rev. Stat. § 83-178(2) (Reissue 2014).

committed by John Joubert of two children in 1983 in Sarpy County, Nebraska. Joubert pled guilty to two counts of first degree murder and was sentenced to death. The State ultimately executed him.

While Joubert was on death row, Pettit interviewed him a number of times. Pettit was then in the process of writing a book in order to have a historical record about the Joubert case. During the interviews, Joubert confessed to a string of violent crimes and admitted that he continued to have fantasies about murdering children. Joubert told Pettit that he illustrated those fantasies in two graphic drawings that had been confiscated as contraband by authorities with DCS. The drawings were placed in Joubert's institutional file maintained by DCS under § 83-178.

Before Joubert was executed, Pettit attempted to gain access to the drawings. In 1988, Joubert handed Pettit a letter that he had written to the prison warden authorizing the release of the drawings to Pettit for analysis by a mental health professional. The body of the letter stated:

> Please release to . . . Pettit of KMTV, Channel 3, the two drawings which were confiscated from my cell on 05 May 87. He intends to take them to a psychiatrist for analysis. At this time there is no agreement for them to be used in the book he is writing, but that may change in the future. Thank you.

The warden refused to release the drawings to Pettit, citing pending appeals of Joubert's convictions. For the next 25 years, the status quo continued.

In 2013, with the 30th anniversary of Joubert's crimes approaching, Pettit requested access to the drawings for inspection and reproduction. DCS refused to permit Pettit to inspect the drawings, stating that the drawings had been placed in Joubert's institutional file and were not subject to further disclosure by DCS except as provided by § 83-178.

Pettit filed a complaint for declaratory judgment against DCS and Hopkins, its acting director. Pettit asked the court to declare that the drawings were not protected by the provisions

of § 83-178 or, to the extent that they were subject to § 83-178, to declare that good cause existed for inspection and reproduction by Pettit. In their responsive pleading, DCS and Hopkins alleged that Pettit lacked good cause for accessing the drawings and that he had presented no authorization for Joubert's personal property to be turned over to him.

During trial, the district court heard testimony in favor of and against making the drawings available for public inspection. Pettit wished to inspect the drawings because Joubert believed that he was "'gonna walk out of this prison'" and said that he was making drawings about killing more children. Pettit believed the drawings showed that something was "deeply wrong" with Joubert. Pettit wanted to have the drawings analyzed by a forensic psychiatrist and to take them to the behavioral science unit at the Federal Bureau of Investigation. He felt the drawings were "significant," "historical," and "educational." The Sarpy County Attorney—who formerly investigated the Joubert case as chief deputy and counsel with the Sarpy County Sheriff's Department—testified in support of Pettit's request. He thought it was a good idea for Pettit to have access to the drawings because "it rounds out the case . . . , and it's a topic of discussion and . . . it's important that people—the public know and understand real things happen, they know the facts." But the director of DCS did not feel Joubert's drawings should be released, stating that he did not believe any social benefit of the drawings would outweigh the harm they might cause.

The district court entered judgment ordering "[DCS] and those in its employ" to permit Pettit to inspect, examine, and reproduce the drawings. The court determined that the drawings were subject to restricted access, because they fell within the statute as material that reflected on Joubert's background, conduct, and associations. The court then considered whether good cause had been shown for inspection of the drawings by Pettit. The court stated:

> That the request for inspection is not being made for the purpose of distribution to the inmate population or

> to those who routinely associate with inmates weighs in favor of good cause. These drawings are nearly 30 years old. The inmate who made them is no longer alive. The purpose of the requested inspection appears to be legitimate. The court accepts that the drawings may be useful to law enforcement officers in further understanding the psychology of serial killers; at least those similar to Joubert.

The court also noted that before he was executed, Joubert did not object to the inspection. The court stated that an objection would have weighed against good cause. The court reasoned that the possibility of reproductions of the drawings appearing in a future publication of Pettit's book did not weigh in favor of or against good cause, but that the nature of the drawings was a factor against good cause. Ultimately, the court concluded that good cause had been shown for inspection and reproduction of the drawings by Pettit.

A timely appeal followed, and we moved the case to our docket.[2]

ASSIGNMENT OF ERROR

DCS assigns that the district court erred in ordering "[DCS] and those in its employ" to permit Pettit to inspect, examine, and reproduce the confiscated drawings of Joubert.

STANDARD OF REVIEW

[1] An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.[3] To the extent that § 83-178(2) may create a special civil statutory remedy, it is more akin to an action at law.[4]

[2,3] The parties agree upon a standard of review, but we conclude that it is incomplete. They assert, and we agree,

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[2] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

[3] *Christiansen v. County of Douglas*, 288 Neb. 564, 849 N.W.2d 493 (2014).

[4] See *In re Interest of D.I.*, 281 Neb. 917, 799 N.W.2d 664 (2011).

that statutory interpretation presents a question of law.[5] And we have often said that when reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[6]

We agree that we must independently determine the meaning of the statute as a whole and, in particular, the phrase "for good cause shown."[7] But once we have defined the term in light of the entire statute, this standard does not instruct us regarding our review of the district court's *application* of the definition to the facts presented in this specific instance.

Although we have previously considered whether "good cause" existed under § 83-178, we did not articulate the appropriate standard of review. In *State v. Vela*,[8] we considered whether the prosecution had good cause to obtain access to a defendant's mental health records that were in DCS' possession. The defendant objected to the release of any medical and psychological records. We held that good cause existed when the defendant in a capital sentencing proceeding placed his or her mental health at issue by asserting mental retardation as a basis for precluding the death penalty or by asserting mental illness as a mitigating circumstance. Because we concluded that the district court did not "err," it would appear that we did not employ a review for abuse of discretion.[9]

[4] But *State v. Vela* presented the question within the framework of an existing criminal case. Here, Pettit brought a declaratory judgment action for the sole and only purpose of viewing and reproducing Joubert's drawings. In a declaratory judgment action treated as an action at law, an appellate court does not disturb factual determinations unless they are clearly

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[5] *In re Trust Created by Isvik*, 274 Neb. 525, 741 N.W.2d 638 (2007).

[6] See *id.*

[7] § 83-178(2).

[8] *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010).

[9] *Id.* at 141, 777 N.W.2d at 301.

wrong.[10] But we have never held that § 83-178 creates a civil statutory remedy available to the public at large.

Nor does it appear that the Nebraska appellate courts have ever articulated a standard for an appellate court's review of a lower court's determination of the existence or nonexistence of good cause. This is more complicated than it may seem. The existence of good cause surely depends upon the factual circumstances. This suggests that some deference to the lower court is appropriate. But the critical question is how far this deference extends. And the dictates of a standard of review often prove dispositive.

Case law from other jurisdictions yields little help. In the context of unemployment compensation, for example, at least one jurisdiction has stated that the existence of good cause is a question of fact,[11] but others have held that it is a question of law,[12] while yet others have determined it to be a mixed question of law and fact.[13] Florida courts have variously held the question to be one of fact, strictly one of law, and a mixed question of law and fact.[14] Rhode Island recognizes the issue as a mixed question of law and fact, but has clarified that the determination of good cause will be made as a matter of law

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[10] *Glad Tidings v. Nebraska Dist. Council*, 273 Neb. 960, 734 N.W.2d 731 (2007).

[11] See, *Claim of Christophides*, 243 A.D.2d 807, 662 N.Y.S.2d 625 (1997); *Sandler v. Catherwood*, 22 A.D.2d 740, 253 N.Y.S.2d 328 (1964).

[12] See, e.g., *Cooper v U of M*, 100 Mich. App. 99, 298 N.W.2d 677 (1980); *Goodwin v. BPS Guard Services, Inc.*, 524 N.W.2d 28 (Minn. App. 1994); *Mo. Div of Employment Sec. v. Labor & Indus.*, 616 S.W.2d 138 (Mo. App. 1981); *McPherson v. Employment Division*, 285 Or. 541, 591 P.2d 1381 (1979).

[13] See, e.g., *Board of Educ., Mont. Co. v. Paynter*, 303 Md. 22, 491 A.2d 1186 (1985); *Snyder v. Virginia Employment Com'n*, 23 Va. App. 484, 477 S.E.2d 785 (1996).

[14] See *Tourte v. Oriole of Naples, Inc.*, 696 So. 2d 1283 (Fla. App. 1997) (collecting cases).

when the facts may lead only to one reasonable conclusion.[15] Utah has stated that a determination of good cause is a mixed question of law and fact, but that the determination is more fact-like in nature.[16]

[5] We hold that whether a person seeking access to an inmate's institutional file under § 83-178 shows good cause is a mixed question of law and fact. What the parties show presents questions of fact, which we review for clear error. But whether the showing establishes good cause is a question of law. As noted above, an appellate court reviews questions of law independently. Thus, where the facts are undisputed, the entire question becomes one of law.

ANALYSIS

We now turn to an examination of the controlling statute. Section 83-178 states:

> (1) The director shall establish and maintain, in accordance with the regulations of the department, an individual file for each person committed to the department. Each individual file shall include, when available and appropriate, the following information on such person:
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> (a) His or her admission summary;
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> (b) His or her presentence investigation report;
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> (c) His or her classification report and recommendation;
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> (d) Official records of his or her conviction and commitment as well as any earlier criminal records;
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> (e) Progress reports and admission-orientation reports;
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> (f) Reports of any disciplinary infractions and of their disposition;
>
> (g) His or her parole plan; and

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[15] See *D'Ambra v. Board of Review*, 517 A.2d 1039 (R.I. 1986). See, also, *Murphy v. Fascio*, 115 R.I. 33, 340 A.2d 137 (1975).

[16] See *Sawyer v. Department of Workforce Services*, 345 P.3d 1253 (Utah 2015).

(h) Other pertinent data concerning his or her background, conduct, associations, and family relationships.

(2) Any decision concerning the classification, reclassification, transfer to another facility, preparole preparation, or parole release of a person committed to the department shall be made only after his or her file has been reviewed. *The content of the file shall be confidential and shall not be subject to public inspection except by court order for good cause shown and shall not be accessible to any person committed to the department.* An inmate may obtain access to his or her medical records by request to the provider pursuant to sections 71-8401 to 71-8407 notwithstanding the fact that such medical records may be a part of his or her individual department file. The department retains the authority to withhold mental health and psychological records of the inmate when appropriate.

(3) The program of each person committed to the department shall be reviewed at regular intervals and recommendations shall be made to the chief executive officer concerning changes in such person's program of treatment, training, employment, care, and custody as are considered necessary or desirable.

(4) The chief executive officer of the facility shall have final authority to determine matters of treatment classification within his or her facility and to recommend to the director the transfer of any person committed to the department who is in his or her custody.

(5) The director may at any time order a person committed to the department to undergo further examination and study for additional recommendations concerning his or her classification, custodial control, and rehabilitative treatment.

(6) Nothing in this section shall be construed to limit in any manner the authority of the Public Counsel to inspect and examine the records and documents of the department pursuant to sections 81-8,240 to 81-8,254, except

> that the Public Counsel's access to an inmate's medical or mental health records shall be subject to the inmate's consent. The office of Public Counsel shall not disclose an inmate's medical or mental health records to anyone else, including any person committed to the department, except as authorized by law.

(Emphasis supplied.)

[6] Although the parties have focused on the emphasized language of § 83-178(2), we examine the entire statute and apply the usual principles of statutory interpretation. Statutory language is to be given its plain and ordinary meaning, and an appellate court's duty in discerning the meaning of a statute is to determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.[17]

Numerous features of § 83-178 caution that the Legislature intended the remedy of subsection (2) to apply only in very narrow circumstances. First, subsection (2) declares that the content of the file is confidential. These are not "open" records. This contrasts markedly with the provisions generally governing access to public records.[18] Second, subsection (1) catalogs the required contents of an institutional file. And virtually all of these documents or materials are confidential in nature or by law. For example, the file contains an inmate's presentence report, which another statute expressly protects from public disclosure.[19] Third, DCS' use of the materials is driven by penological purposes. The first sentence of

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[17] *Village of Hallam v. L.G. Barcus & Sons*, 281 Neb. 516, 798 N.W.2d 109 (2011).

[18] See Neb. Rev. Stat. § 84-712 et seq. (Reissue 2014).

[19] See Neb. Rev. Stat. § 29-2261(6) (Cum. Supp. 2014) ("presentence report or psychiatric examination shall be privileged and shall not be disclosed directly or indirectly to anyone other than a judge, probation officers to whom an offender's file is duly transferred, the probation administrator or his or her designee, or others entitled by law to receive such information").

subsection (2) mandates that before undertaking any decision involving an inmate's classification, transfer, or release, prison officials must review the institutional file. Subsections (3), (4), and (5) focus entirely on internal prison matters regarding the particular inmate. Fourth, the statute's confidentiality provision was evidently considered so comprehensive and robust that in 2001, the Legislature deemed it necessary to expressly provide the Public Counsel—a state officer already empowered with broad investigative authority[20]—with limited access to the materials.[21] The "good cause" exception of subsection (2) must be viewed in the light of this rigorous statutory scheme.

[7] Moreover, we have considerable doubt that the Legislature intended to create a private right of action enforceable by a declaratory judgment. Whether a statute creates a private right of action depends on the statute's purpose and whether the Legislature intended to create a private right of action.[22] First, § 83-178(2) does not authorize the director of DCS to unilaterally grant the privilege of inspection to a member of the public. Rather, the inspection may be allowed only by "court order." Thus, the remedy is clearly not directed toward review of a decision by the director—rather, the director has no discretion under the statute to allow public inspection. Second, the statutory language does not expressly create a private right of action. Third, the language seems calculated to apply in the context of an existing court proceeding, having a separate purpose or right of action, where the material in the institutional file would serve as evidence. But this issue was not raised in the district court. Thus, for purposes of this opinion, we assume without deciding that a private right of action exists.

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[20] See Neb. Rev. Stat. § 81-8,240 et seq. (Reissue 2014).

[21] See 2001 Neb. Laws, L.B. 15, § 1.

[22] *Professional Mgmt. Midwest v. Lund Co.*, 284 Neb. 777, 826 N.W.2d 225 (2012).

We now turn to the specific provision stating, "The content of the file shall be confidential and shall not be subject to public inspection except by court order for good cause shown and shall not be accessible to any person committed to the department."[23] Our decision in *State v. Vela*[24] did not define the phrase "for good cause shown."[25] Thus, we must determine its meaning in this particular context.

In other contexts, this court and the Nebraska Court of Appeals have quoted a dictionary definition of "good cause" as "'a cause or reason sufficient in law; one that is based on equity or justice or that would motivate a reasonable man under all the circumstances.'"[26] And we have declared that the meaning of good cause must be determined in light of all of the surrounding circumstances.[27] In the context of a statute concerning vacating an order in a formal testacy proceeding,[28] we stated that good cause meant "a logical reason or legal ground, based on fact or law, why an order should be modified or vacated."[29] In addressing a statute concerning the disposition of untried charges,[30] the Court of Appeals stated that "good cause is something that must be substantial, but also a factual question dealt with on a case-by-case basis."[31]

[8] We conclude that the same definition should apply to this statute. We hold that for purposes of § 83-178(2), "good

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[23] § 83-178(2).

[24] *State v. Vela, supra* note 8.

[25] § 83-178(2).

[26] *DeVries v. Rix*, 203 Neb. 392, 403, 279 N.W.2d 89, 95 (1979) (emphasis omitted). Accord *In re Conservatorship of Estate of Marsh*, 5 Neb. App. 899, 566 N.W.2d 783 (1997).

[27] See *DeVries v. Rix, supra* note 26.

[28] Neb. Rev. Stat. § 30-2437 (Reissue 2008).

[29] *DeVries v. Rix, supra* note 26, 203 Neb. at 403-04, 279 N.W.2d at 95.

[30] See Neb. Rev. Stat. § 29-3805 (Reissue 2008).

[31] *State v. Caldwell*, 10 Neb. App. 803, 808, 639 N.W.2d 663, 667 (2002).

cause" means a logical or "legally sufficient reason"[32] in light of all of the surrounding facts and circumstances and in view of the very narrow access intended by the Legislature. Because our decision is based on the plain and ordinary meaning of the statute, we need not resort to legislative history. However, for the sake of completeness, we observe that the first two sentences of § 83-178(2) remain essentially unchanged from their original enactment in 1969[33] and that the legislative history of that enactment does not speak to the meaning or purpose of the provision.[34]

The question then becomes whether, in light of all of the surrounding facts and circumstances and in view of the very narrow access intended by the Legislature, Pettit established a logical or legally sufficient reason. We conclude that he did not.

In essence, Pettit and the Sarpy County Attorney—individuals involved in reporting on and investigating Joubert's crimes—believed that the drawings had historical value and that the public had a right to know about the drawings. But as we have already explained, this is not an "open records" provision. Thus, their views or opinions cannot enlarge the purpose defined by the statute or detract from the statutory prescription of confidentiality.

Although Pettit also proffered a scholarly or forensic purpose, it was purely speculative. Pettit explained that Joubert believed he would be released from prison and that Joubert "left a roadmap" about killing more children upon release. Pettit wished to have the drawings examined by a forensic

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[32] Black's Law Dictionary 266 (10th ed. 2014).

[33] See 1969 Neb. Laws, ch. 817, § 9, p. 3076.

[34] See, Introducer's Statement of Intent, L.B. 1307, Committee on Government and Military Affairs, 80th Leg., 1st Sess. (Mar. 20, 1969); Committee on Government and Military Affairs Hearing, L.B. 1307, 80th Leg., 1st Sess. 8-24 (Mar. 20, 1969); Floor Debates, 1st Sess. 2990-93 (July 17, 1969), 1st Sess. 3231-32 (July 25, 1969), 1st Sess. 3304-11 (July 29, 1969), and 1st Sess. 3888 (Aug. 12, 1969).

psychiatrist and believed that police could learn from the drawings and resulting analysis. But Pettit presented no evidence that he possessed any scientific or other qualifications to make such a judgment. And he offered no evidence from any expert in psychology or penology supporting his belief regarding the value of such an examination.

On appeal, DCS focuses on the financial benefits that might flow to Pettit from sales of future editions of his book. Before the district court, the testimony of DCS' director did not emphasize this circumstance. We do not view Pettit's interest or expectation of financial gain as a significant factor in our analysis, but whatever weight it may have does not support his request. At oral argument, there was also a suggestion that the words "public inspection" omitted copying or duplication of the materials. In light of our conclusion that Pettit failed to show good cause, we need not discuss the nature and extent of a trial court's power in a proper case to impose conditions for "public inspection."

CONCLUSION

Upon our de novo review of the undisputed facts, we conclude that Pettit failed to demonstrate good cause for inspection and reproduction of the drawings. We therefore reverse the district court's judgment and remand the cause with directions to dismiss Pettit's complaint.

Reversed and remanded with directions.

Stephan, J., not participating.