COURT OF APPEALS
DECISION
DATED AND FILED

March 8, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1497 **Cir. Ct. No. 1990CF584**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOACHIM E. DRESSLER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Joachim Dressler appeals pro se from an order denying his WIS. STAT. § 974.06 (2003-04)[1] motion for postconviction relief. The central themes to his plethora of claims are that, because he has a First Amendment right to possess sexually expressive materials, such materials cannot be seized or used as evidence against him and that his constitutional rights were violated by evidence of "homosexual overkill." The State advances different theories, including laches, for procedurally rejecting Dressler's claims. We only address the dispositive ground. *See* ***State v. Zimmerman***, 2003 WI App 196, ¶23, 266 Wis. 2d 1003, 669 N.W.2d 762 (only dispositive issue need be addressed). Under the doctrine of law of the case, we affirm the order denying Dressler's postconviction motion.

¶2 In August 1991, a jury found Dressler guilty of first-degree intentional homicide for killing James Madden, a young man who disappeared while soliciting door-to-door in the area of Dressler's home. Dressler's conviction and the order denying his motion for postconviction relief were affirmed in an unpublished decision. ***State v. Dressler***, No. 92-2049-CR, unpublished slip op. (Wis. Ct. App. Nov. 17, 1993). The details of the crime and evidence produced at trial are set forth in that opinion and in ***Dressler v. McCaughtry***, 238 F.3d 908 (7th Cir. 2001), and need not be repeated here. It is sufficient to note that the State's theory was that Madden was the victim of "homosexual overkill" and that videotapes, photographs and magazines depicting actual murders, mutilation, homosexual acts and other pornography were seized from Dressler's home and introduced as evidence at trial.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶3 Following his appeal to this court and the Wisconsin Supreme Court's denial of his petition for review and the United State Supreme Court's denial of his petition for certiorari, Dressler petitioned the United States District Court for the Eastern District of Wisconsin for a writ of habeas corpus. ***Dressler***, 238 F.3d at 911. He asserted eight grounds for relief, including claims that admission of the State's "homosexual overkill" theory violated his First, Fifth and Fourteenth Amendment rights and that his possession of materials seized at his home was protected by the First Amendment. The federal district court denied Dressler's petition. ***Dressler v. McCaughtry***, No. 97-C-431, unpublished op. (E.D. Wis. Apr. 28, 1999).[2] The Seventh Circuit Court of Appeals considered and rejected Dressler's claim that his First Amendment rights were violated by admission of materials protected by the First Amendment. ***Dressler***, 238 F.3d at 915.

¶4 In February 2004, Dressler filed in the circuit court a motion for postconviction relief under WIS. STAT. § 974.06. The motion was denied and Dressler appeals.

¶5 A motion for postconviction relief under WIS. STAT. § 974.06 cannot be used to relitigate matters once litigated "no matter how artfully the defendant may rephrase the issue." ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). "The law of the case doctrine is a 'longstanding rule that a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on

[2] Although the federal district court's opinion is not in the record, it is reproduced in full in the respondent's appendix. We may take judicial notice of it. *See* ***Swan Boulevard Dev. Corp. v. Bybulski***, 14 Wis. 2d 169, 171, 109 N.W.2d 671 (1961); WIS. STAT. § 902.01(2)(b).

later appeal.'" ***State v. Moeck***, 2005 WI 57, ¶18, 280 Wis. 2d 277, 695 N.W.2d 783 (citation omitted), *cert. denied*, 126 S. Ct. 551 (2005). Whether law of the case has been established by prior decisions is a question of law we review de novo. *See* ***id.***, ¶24.

¶6 Dressler makes several arguments which challenge the seizure and admissibility of the sexually expressive materials found in his home. He claims that the search warrant for the seizure of materials protected by the First Amendment was overbroad and that "[t]here is simply no such thing as a constitutionally valid warrant to search a home for First Amendment-protected materials. Searches and seizures of them for their content are forbidden…." The federal district court held that in the face of Dressler's First Amendment challenge, the warrant passed constitutional muster. ***Dressler***, No. 97-C-431, unpublished op. at 21. The issue cannot be revisited.

¶7 Dressler argues that because there can be no regulation of materials protected by the First Amendment, Wisconsin courts cannot acquire subject-matter jurisdiction over such materials. He claims the same is true with respect to a person's status as a homosexual. He equates a lack of subject matter jurisdiction with an inability to permit such evidence at trial. Dressler also refashions his challenge to the admissibility of the sexually expressive materials as a constitutional claim by characterizing the admission of First Amendment protected materials as an unconstitutional "prior restraint." He argues that WIS. STAT. § 904.04(2), governing the admission of other acts evidence, when applied to the act of possessing First Amendment protected materials is unconstitutionally overbroad and vague, constitutes content-based regulation, and violates the prohibition against *ex post facto* laws.

¶8 These arguments are all premised on the fact that First Amendment protected materials were used as evidence at trial. The federal court of appeals held that the use of such materials was constitutionally sound in the face of Dressler's broadest First Amendment claims. *See* ***Dressler***, 238 F.3d at 915. The court explained that merely drawing logical conclusions from the content of the protected material does not interfere with Dressler's First Amendment right to possess such material. ***Id.*** In short, the federal court held that admission of the materials under WIS. STAT. § 904.04(2) did not offend the constitution. The federal court's holding is law of the case and Dressler may not relitigate claims that the material should not have been used as evidence at trial.

¶9 Even if we deem Dressler's claim that, as applied, WIS. STAT. § 904.04(2) constitutes an *ex post facto* law to be new and not addressed by the federal court, it lacks any footing. Dressler was not prosecuted for his possession of First Amendment protected materials. Admission of the evidence does not criminalize conduct that was innocent before. *See* ***State v. Haines***, 2003 WI 39, ¶9, 261 Wis. 2d 139, 661 N.W.2d 72 (the *ex post facto* clause is violated by law that punishes as a crime an act previously committed, which was innocent when done).

¶10 Once again Dressler challenges the admissibility of evidence of "homosexual overkill" and his homosexual status. He claims the expert was not sufficiently qualified. He contends the trial court's rationale for admitting such evidence was irrational and based on an erroneous view of the law. The only constitutional underpinning to his claim that he makes is that "[g]uilt by association violates the First Amendment," and that "[l]aws that single out homosexuals for special treatment under the law violate the [sic] Equal

Protection." He concludes that the circuit court's evidentiary rulings were an erroneous exercise of discretion because they were unconstitutional.

¶11 We reject Dressler's attempt to refashion as constitutional claims his challenge to the admission of the "homosexual overkill" evidence and evidence that he is a homosexual. His claims are not new and the admissibility of such evidence was already upheld on appeal. Further, the federal court of appeals explained that evidence regarding the "homosexual overkill" theory was only an explanation for Dressler's motive and did not relieve the prosecution of proving the essential elements of the crime. *See* ***Dressler***, 238 F.3d at 916. Thus, Dressler was not convicted simply because he was a homosexual. His homosexuality and his penchant for sexual violence formed links in the chain of evidence proving his guilt. ***Id.*** at 915.

¶12 Finally, Dressler argues that the circuit court was required to hold a hearing on his WIS. STAT. § 974.06 motion because he alleged that his trial counsel was ineffective for not raising First Amendment and other constitutional challenges to seizure and admission of protected materials. If the record conclusively demonstrates that the defendant is not entitled to relief on a postconviction claim of ineffective assistance of counsel, the trial court has discretion to grant or deny a hearing on the motion. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. We review such a discretionary determination under the deferential erroneous exercise of discretion standard. ***Id.*** Here, on the heels of the federal court of appeals' decision that the admission of evidence against Dressler was constitutionally sound, the circuit court properly concluded that the record conclusively showed Dressler was not entitled to relief on his claim of ineffective assistance of counsel. The claims Dressler contends counsel should have raised lacked merit and counsel is not ineffective for not

raising them. *See* ***State v. Wheat***, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441.

¶13 The State requests that we conclude that Dressler is abusing the appellate process by repetitively litigating the same matters and prohibit Dressler from further filings with respect to his conviction unless he submits an affidavit establishing that future appellate filings are new and viable. *See* ***State v. Casteel***, 2001 WI App 188, ¶25, 247 Wis. 2d 451, 634 N.W.2d 338. We decline to impose such a restraint at this time. However, Dressler should take heed that his belief that his possession of First Amendment protected materials insulates those materials from being used as evidence has been fully litigated and found to be, at every turn, without merit. *See* ***Dressler***, 238 F.3d at 912 (Dressler's First Amendment argument is "borderline frivolous at best"). Future pursuance of any claim based on the use of those materials or evidence of Dressler's homosexuality at trial would be frivolous and will garner appropriate sanctions. *See* WIS. STAT. RULE 809.83(2).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.