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**DISTRICT IV**

December 30, 2014

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

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2013AP1125

State of Wisconsin ex rel. Derek S. Kramer v. Diane Alderson  
(L.C. # 2012CV533)

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

Derek Kramer, pro se, appeals an order denying reconsideration of the dismissal of his petition for a writ of mandamus. In an earlier order, this court determined that we lack jurisdiction to review the January 22, 2013 order dismissing the mandamus petition because Kramer's May 14, 2013 notice of appeal was not timely filed as to that order. *See* WIS. STAT. § 808.04(1) (2011-12)<sup>1</sup> (in civil matter in which no notice of entry of judgment is given, notice of appeal must be filed within ninety days after entry of the judgment or order appealed from);

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

*see also* WIS. STAT. RULE 809.10(1)(e) (this court lacks jurisdiction if notice of appeal is not timely filed).

Although the notice of appeal was timely filed as to the order denying reconsideration, we noted an appeal cannot be taken from an order denying a motion for reconsideration that presents the same issues as those determined in the order sought to be reconsidered. *See Silverton Enters., Inc. v. General Cas. Co. of Wisconsin*, 143 Wis. 2d 661, 665, 422 N.W.2d 154 (Ct. App. 1988). The concern is that a reconsideration motion should not be used to extend the time to appeal from a judgment or order when that time has expired. *Id.*; *see also Ver Hagen v. Gibbons*, 55 Wis. 2d 21, 197 N.W.2d 752 (1972). Because it was unclear from the record before us whether the motion for reconsideration presented the same issues as those determined in the order dismissing Kramer's mandamus petition, we directed the parties to address in their appellate briefs whether this court has jurisdiction to review the order denying reconsideration.

In 2012, Kramer, then an inmate at the Wisconsin Secure Program Facility, made a public records request to Diane Alderson, the prison's records custodian, seeking "any/all" documents relating to Department of Corrections (DOC) conduct report #2242146. The conduct report described an incident involving a coded message that was discovered in the prison library. Once decoded, the message was found to describe conduct by "security threat groups" (i.e. gang-related conduct), including a reference to Kramer's involvement by an alleged code name, "K." Specifically, the message described gang-planned threats of fake bombs and fake anthrax. Kramer's cell was subsequently searched and prison staff discovered contraband, including certain material related to the "Sovereign Citizens," a security threat group.

In response to Kramer's records request, Alderson provided Kramer with records but withheld all those documents considered contraband under WIS. STAT. § 19.35(1)(am)2.c.<sup>2</sup> These withheld records are the subject of Kramer's underlying petition for a writ of mandamus in the circuit court. After the court issued an "Alternative Writ of Mandamus" ordering Alderson to either release all non-confidential, unprivileged, and available information requested or show cause to the contrary, Alderson moved to quash the writ and sought *in camera* inspection of the records.

After a hearing, the court ruled orally that the records filed under seal for *in camera* inspection were lawfully withheld from Kramer. Kramer protested that he was entitled to additional documents not filed for *in camera* inspection. Kramer noted that document DOC-2366, "Review of Conduct Report/Evidence Related to Security Threat Groups," had not been produced until it was served on him as part of Alderson's motion to quash the writ of mandamus. Kramer also noted that Alderson withheld a contraband property tag (Document DOC-1266) and a chain of possession of evidence form (Item Number 11-07). The circuit court determined that if additional responsive records existed like those Kramer described, they should be provided to Kramer.

The circuit court memorialized its oral ruling quashing the writ of mandamus in a January 22, 2013 order. The court added:

To the extent [Kramer] claimed he had not received all of the documentation that was used as part of his conduct report proceeding, said claim is curious as [Alderson]'s counsel

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<sup>2</sup> This statute creates an exception to disclosure for any record containing personally identifiable information that, if disclosed, would endanger the security, including the security of the population or staff, of any state prison. *See* WIS. STAT. § 19.35(1)(am)2.c.

acknowledged that [Kramer] was entitled to the documents allegedly withheld, and none of those documents were contained in the documents sent for in camera inspection.... It would be nonsensical for [Alderson] to intentionally withhold documents pursuant to an open records request and then provide that document to [Kramer] as part of a motion to quash. It is not necessary to determine whether it was [Kramer], [Alderson], or neither, that mishandled this document, or their copy of this document, because [Kramer] now has a copy.

With respect to the contraband property tag and chain of evidence form, the court stated: “Judicial economy dictates that rather than holding an evidentiary hearing, and regardless of whether the documents were previously provided to [Kramer], [Kramer] receive copies, assuming they exist, and [Alderson] is directed to determine if the documents exist, and if they do, provide [Kramer] with copies.”

Kramer filed a motion for reconsideration on January 23, 2013, asserting: (1) the court committed a manifest error of law by dismissing the mandamus action as to materials the court construed as contraband; (2) the court committed a manifest error of law with regard to Alderson’s required disclosure of Document DOC-1266, Document DOC-2366, and Item Number 11-07; (3) a causal nexus existed between the filing of the mandamus action and his procurement of Document DOC-2366 from Alderson; and (4) the circuit court should have awarded “expenses” to Kramer because the filing of his mandamus action prompted the production of documents from Alderson.

On January 28, Alderson located the two records referenced in the court’s order and delivered them to Kramer. Kramer then filed an amended motion for reconsideration, again asserting the circuit court committed manifest error when it found in Alderson’s favor, with emphasis on the fact that Alderson provided Document DOC-1266, Document DOC-2366, and Item Number 11-07 to Kramer after he commenced the mandamus action. The reconsideration

motions were denied in an order concluding that Kramer had “not shown the existence of newly discovered evidence or that this court committed a manifest error of law or fact” when issuing the oral ruling or final order.

To the extent Kramer argues that his motions for reconsideration raised newly discovered evidence and new legal arguments, we are not persuaded. As Alderson points out, the motions merely rehashed the same arguments using the same evidence the circuit court already reviewed.<sup>3</sup> Kramer’s reconsideration motions challenge the circuit court’s determination that Alderson lawfully withheld those documents that were submitted for *in camera* review as contraband, but raise no new argument to challenge that determination. With respect to Kramer’s arguments regarding the documents produced after the mandamus action was filed, the court was aware of these documents at the January 11, 2013 hearing on Alderson’s motion to quash. Further, the order quashing the writ specifically referenced these documents, intimating that the failure, if any, to provide them was due to unintentional mishandling. Because the motions for reconsideration presented the same issues as those determined in the order sought to be reconsidered, we lack jurisdiction to review the order denying reconsideration. *See Silvertown*, 143 Wis. 2d at 665.

Upon the foregoing,

IT IS ORDERED that the appeal is dismissed for lack of jurisdiction.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*

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<sup>3</sup> We note that Kramer did not file a reply brief and, therefore, implicitly concedes Alderson’s arguments. *See United Coop. v. Frontier FS Coop.*, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant’s failure to respond in reply brief to an argument made in respondent’s brief may be taken as a concession).