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DISTRICT I

August 31, 2021

To:

Hon. William S. Pocan
Circuit Court Judge
Electronic Notice

John Barrett
Clerk of Circuit Court
Milwaukee County Courthouse
Electronic Notice

Jody J. Schmelzer
Electronic Notice

Melvin Shelton
124 W. Hadley St.
Milwaukee, WI 53212-2422

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

2020AP364 Melvin Shelton v. Gale Shelton (L.C. # 2019CV7331)

Before Brash, C.J., Graham and White, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Melvin Shelton, *pro se*, appeals from a circuit court order dismissing his 42 U.S.C. § 1983 claim against the Department of Corrections ("DOC"), the Sex Offender Registration Program ("SORP") Administration, and Gale Shelton, who prosecuted a criminal case against him (collectively "the respondents").[1] Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT.

[1] To avoid confusion, we reference Gale Shelton by first and last name when she is specifically mentioned in this opinion.

RULE 809.21 (2019-20).[2] We further conclude that the circuit court properly granted the respondents' motion to dismiss Shelton's complaint. Therefore, we summarily affirm.

In 1987, Shelton was convicted of first-degree sexual assault.[3] Gale Shelton prosecuted the case. The circuit court ultimately sentenced Shelton to an indeterminate period of time in prison, not to exceed twenty years.

In 2011, Shelton was discharged from DOC supervision. Despite his release, Shelton was required to register as a sex offender for life under WIS. STAT. § 301.45. Wisconsin's SORP is administered by the DOC. *See* § 301.45(2).

In 2015, Shelton filed a civil case against the DOC challenging the requirement that he register as a sex offender. The circuit court subsequently dismissed the action, finding that Shelton was barred from litigating his claim under the doctrine of claim preclusion because he had previously raised it in his criminal proceedings and the circuit court ruled against him.[4] The circuit court nevertheless went on to address the merits, concluding that, in any event, Shelton was properly required to register as a sex offender for life.

[2] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

[3] For purposes of this appeal, we take the facts set forth in Shelton's complaint as true. *See* ***Meyer v. Laser Vision Inst.***, 2006 WI App 70, ¶3, 290 Wis. 2d 764, 714 N.W.2d 223. We additionally take judicial notice of information obtained from Wisconsin's Consolidated Court Automation Programs (CCAP), which reflects information entered by court staff. *See* WIS. STAT. § 902.01; *see also* ***Kirk v. Credit Acceptance Corp.***, 2013 WI App 32, ¶5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522.

[4] *See* ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 549-50, 525 N.W.2d 723 (1995) (adopting the term claim preclusion to replace res judicata).

In 2019, Shelton filed the underlying action pursuant to 42 U.S.C. § 1983. He claimed that he should no longer be required to register as a sex offender because he was "absolutely" discharged from DOC supervision. He also challenged his 1987 conviction, arguing that it was the result of a warrantless arrest, there was no DNA evidence, and Assistant District Attorney Gale Shelton's conduct was improper.

The resondents moved to dismiss Shelton's complaint. Following briefing, the circuit court granted their motion, and this appeal follows.

"Whether a complaint states a claim for relief is a question of law which this court reviews *de novo*." ***Meyer v. Laser Vision Inst.***, 2006 WI App 70, ¶3, 290 Wis. 2d 764, 714 N.W.2d 223 (italics added). "A motion to dismiss a complaint for failure to state a claim tests the legal sufficiency of the complaint." ***Id.*** "The reviewing court must construe the facts set forth in the complaint and all reasonable inferences that may be drawn from those facts in favor of stating a claim." ***Id.*** The complaint should be dismissed "only if it appears certain that no relief can be granted under any set of facts the plaintiffs might prove in support of their allegations." ***Id.***

First, insofar as Shelton continues to argue that he should not be required to register as a sex offender, we conclude this claim is barred by claim preclusion.[5] The respondents contend this issue was litigated and conclusively determined in his 2015 civil case against the DOC. *See* ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995)

[5] It appears Shelton has abandoned this claim on appeal. For the sake of judicial efficiency, however, we briefly address it.

(explaining that under claim preclusion, a final determination on the merits "'is conclusive in all subsequent actions between the same parties [or their privies] as to all matters which were litigated or which might have been litigated in the former proceedings'" (alteration in original; citation omitted)). Shelton does not refute the respondents' position as to claim preclusion; therefore, we deem it conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (holding that unrefuted arguments are deemed conceded).

Beyond this, Shelton's remaining claims, as best we can discern them, fail for a number of reasons.[6] First, we conclude that the DOC and the SORP cannot be sued under 42 U.S.C. § 1983 because they are not "persons." *See* ***Lindas v. Cady***, 150 Wis. 2d 421, 424, 441 N.W.2d 705 (1989) (concluding that plaintiff's § 1983 suit against the Department of Health and Social Services (DHSS) was barred because DHSS is not a person). Liability under § 1983 attaches to "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage" of state power deprives a citizen of any right under the Constitution or federal law. Because DOC and SORP are not "persons" within the meaning of § 1983, Shelton's challenge to his sex offender registry requirement was not a claim against those entities upon which relief could be granted.

Second, pursuant to ***Heck v. Humphrey***, 512 U.S. 477 (1994), a 42 U.S.C. § 1983 action cannot be used to challenge a conviction that has not been vacated or reversed. ***Id.*** at 486-87. In

[6] Shelton's briefing contains no record citations and largely consists of disjointed assertions and citations without any correlating legal analysis explaining how his claims are specifically supported by the legal authority. While we do grant some leniency to *pro se* litigants, we cannot go so far as to make a *pro se* appellant's arguments for him. *See* ***Waushara Cnty. v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992). To the extent Shelton's assertions are attempts to raise new arguments for the first time on appeal, we do not address them. *See* ***Tatera v. FMC Corp.***, 2010 WI 90, ¶19 n.16, 328 Wis. 2d 320, 786 N.W.2d 810 ("Arguments raised for the first time on appeal are generally deemed forfeited.").

order to recover damages for an unlawful conviction, Shelton was required to "prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal … or called into question by a federal court's issuance of a writ of habeas corpus[.]" *See* ***id.*** Shelton's 1987 conviction has not been overturned. As such, Shelton's claims related to his conviction—namely, his claims that his arrest was unlawful and that the evidence used to convict him was insufficient—are not cognizable under § 1983. The complaint does not state a claim upon which relief can be granted on these bases.

Third, Shelton's claim that Assistant District Attorney Gale Shelton's conduct was improper also fails because she is shielded by absolute prosecutorial immunity. Shelton alleged in his complaint that Assistant District Attorney Gale Shelton should have requested DNA evidence and that she did not prove the case beyond a reasonable doubt, which was a structural defect. However, in ***Imbler v. Pachtman***, 424 U.S. 409 (1976), the court held that a prosecutor has absolute immunity from 42 U.S.C. § 1983 claims arising out of malicious or dishonest prosecution. ***Id.*** at 427. Specifically, a prosecutor is absolutely immune from civil damages for acts that are "intimately associated with the judicial phase of the criminal process." *See* ***id.*** at 430. The purportedly improper conduct on which Shelton relies is intimately associated with the judicial phase of the criminal process and, therefore, is not a basis for civil liability. *See* ***id.***

Shelton additionally suggested in his complaint that Assistant District Attorney Gale Shelton is responsible for the purported lack of a warrant in the underlying criminal case. However, as highlighted by the circuit court in its decision, the complaint did not allege any other facts from which to infer that Assistant District Attorney Gale Shelton acted in an investigative capacity in Shelton's allegedly warrantless arrest. *See* ***C. Coakley Relocation Sys. v. City of Milwaukee***, 2008 WI 68, ¶14, 310 Wis. 2d 456, 750 N.W.2d 900 (noting that even on

de novo review, we benefit from the lower court's analysis). Shelton's allegations are insufficient to state a claim upon which relief may be granted. *See* ***Cattau v. National Ins. Servs. of Wis.***, 2019 WI 46, ¶5, 386 Wis. 2d 515, 926 N.W.2d 756 ("While courts must accept all well-pleaded facts as true, courts cannot add facts to a complaint, and do not accept as true legal conclusions that are stated in the complaint."), *reconsideration denied*, 2019 WI 84, 388 Wis. 2d 652, 931 N.W.2d 538.

The circuit court properly dismissed Shelton's complaint. Because we affirm for the reasons discussed, we need not address the additional grounds the respondents raise in support of affirmance. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W.2d 663 (1938) (concluding that only dispositive issues need be addressed).

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals