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WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

June 16, 2022

To:

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Clerk of Circuit Court
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Electronic Notice

Clayton Patrick Kawski
Electronic Notice

Brian Keenan
Electronic Notice

Joachim Dressler 230174
Waupun Correctional Inst.
P.O. Box 351
Waupun, WI 53963-0351

Hon. Randy R. Koschnick
Director of State Courts
P.O. Box 1688
Madison, WI 53701-1688

Waupun Correctional Inst.
Waupun Correctional Inst.
P.O. Box 351
Waupun, WI 53963-0351

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

2020AP1870 Joachim Dressler v. Josh Kaul (L.C. # 2019CV3282)

Before Blanchard, P.J., Kloppenburg, and Fitzpatrick, 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).

Joachim Dressler, pro se, appeals a circuit court order that dismissed Dressler's action for a declaratory judgment and injunctive relief to prohibit State officials from enforcing certain statutes related to the seizure of evidence and the admission of evidence at trial. The circuit court determined that Dressler's complaint fails to state a claim upon which relief could be granted and that his claims are barred by issue preclusion. Based upon our review of the briefs

and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[1] We summarily affirm.

In August 1991, a jury found Dressler guilty of first-degree intentional homicide for killing James Madden, who had disappeared in the area of Dressler's home. ***State v. Dressler***, No.2004AP1497, unpublished slip op. (WI App March 8, 2006). The State's theory at trial was that Madden was the victim of "homosexual overkill;" and videotapes, photographs, and magazines depicting actual murders, mutilation, homosexual acts, and other pornography that had been seized from Dressler's home were introduced as evidence at trial. ***Id.*** at *1. We affirmed Dressler's conviction on appeal. ***State v. Dressler***, No. 92-2049-CR, unpublished slip op. (WI App Nov. 17, 1993).

Dressler then sought habeas corpus relief in federal court. ***Dressler v. McCaughtry***, 238 F.3d 908 (7th Cir. 2001). Dressler's arguments in federal court included the claim that the seizure from his home of materials depicting intentional violence and homosexual acts and the introduction of those materials at trial violated the First Amendment. ***Id.*** The Seventh Circuit rejected that argument on its merits, calling it "borderline frivolous at best." ***Id.*** at 912. The court flatly rejected Dressler's claim that the seizure of evidence and its introduction at trial violated Dressler's First Amendment rights. ***Id.*** at 915. It explained that "[t]he fundamental flaw in Dressler's First Amendment argument, and the major distinguishing factor in the string of broad First Amendment cases he relies upon, is that he was not convicted of possessing, distributing, or looking at the videos and pictures in question." ***Id.*** The court noted further that,

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

"[a]lthough they may have helped convict Dressler of murder, he never explains how his right to possess or look at them was affected by their use as evidence against him." ***Id.*** The court concluded that "the jury was permitted to draw an inference about Dressler's state of mind based on the fact that he maintained a collection of photographs depicting fates similar to that suffered by Mr. Madden," explaining as a parallel that "[i]f Dressler were accused of causing an explosion, a jury could logically infer his guilt from the fact that a bomb-making manual was found at his home." ***Id.***

Dressler then filed a WIS. STAT. § 974.06 motion for postconviction relief in February 2004. ***State v. Dressler***, No.2004AP1497, unpublished slip op. (WI App March 8, 2006). In that action, Dressler argued "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.'" ***Id.*** at *1. We rejected that argument based on the law of the case because it had already been decided by the federal court. ***Id.*** at *2.

In November 2019, Dressler initiated this action, seeking: (1) a declaratory judgment that WIS. STAT. §§ 968.13, 904.01, and 904.04(2) violate the First Amendment; and (2) an injunction prohibiting State officials from enforcing those statutes. He argued that, in the criminal proceedings against him, WIS. STAT. § 968.13—which authorizes search warrants—was "applied to permit the seizure of any, unspecified, First Amendment-protected printed and filmed materials from a home." He also argued that §§ 904.01 (defining relevant evidence) and 904.04(2) (allowing "other acts" evidence) were "construed to include within their scope the mere 'act of possessing'" materials; allowed the State "to admit their message-content as inculpatory criminal evidence to prove state-alleged homosexuality"; and "lack sufficient

safeguards for confining the censor's action to judicially determined constitutional limits, and thus authorize a prior restraint of free speech." The respondents moved to dismiss the complaint for multiple reasons, including failure to state a claim and issue preclusion. The circuit court dismissed the complaint for failure to state a claim and because it is barred by issue preclusion following the Seventh Circuit's decision in Dressler's appeal in his habeas action. We agree that Dressler's complaint fails to state a claim upon which relief may be granted, and we affirm on that basis.[2]

A motion to dismiss for failure to state a claim "tests the legal sufficiency of the complaint." ***Watts v. Watts***, 137 Wis. 2d 506, 512, 405 N.W.2d 303 (1987). We accept as true all facts set forth in the complaint, and we make all reasonable inferences in favor of the plaintiff. ***Id.*** "We will affirm an order dismissing a complaint for failure to state a claim only if it appears to a certainty that no relief can be granted under any set of facts that the plaintiffs could prove in support of their allegations." ***Kohlbeck v. Reliance Constr. Co., Inc.***, 2002 WI App 142, ¶9, 256 Wis. 2d 235, 647 N.W.2d 277. We independently review the circuit court's decision on a motion to dismiss. *See* ***State ex rel. Lawton v. Town of Barton***, 2005 WI App 16, ¶9, 278 Wis. 2d 388, 692 N.W.2d 304.

Dressler argues that the assertions in his complaint support numerous grounds for declaratory judgment and injunctive relief. We address each in turn.

[2] Because we conclude that Dressler's complaint was properly dismissed on the basis that it fails to state a claim, we need not reach the parties' dispute over whether his claims are barred by issue preclusion. Additionally, we need not reach the alternative arguments to affirm that were well briefed by the respondents.

First, Dressler argues that, because the evidence seized from his home was protected by the First Amendment, the circuit court at his criminal trial lacked subject matter jurisdiction to admit that evidence. He also argues that the court lacked subject matter jurisdiction to admit evidence of Dressler's homosexual status or conduct. However, Dressler is not consistent in making this argument. At points in his briefing, he correctly recognizes that the circuit court had subject matter jurisdiction over the homicide charge against him. *See* WIS. STAT. § 753.03. It is sufficient to defeat this argument to note that Dressler does not allege that he has ever been *charged* with possessing the items seized from his home or with homosexual status or conduct, and therefore he has not stated a claim for declaratory or injunctive relief based on the circuit court's asserted lack of subject matter jurisdiction.

Next, Dressler argues that WIS. STAT. § 968.13 is unconstitutional when it authorizes the seizure of First Amendment-protected materials from a home. In support, Dressler cites ***State v. Voshart***, 39 Wis. 2d 419, 159 N.W.2d 1 (1968), for the proposition that § 968.13 is unconstitutional unless it is limited to prohibit the seizure of First Amendment-protected materials. However, nothing in ***Voshart*** prohibits the seizure of First Amendment-protected materials for use as evidence in a homicide trial. Rather, ***Voshart*** stated that the defendant was not entitled to the return of obscene materials seized pursuant to a warrant that was later determined to be defective. ***Id.*** Accordingly, ***Voshart*** is inapposite.

Dressler also cites ***Fort Wayne Books v. Indiana***, 489 U.S. 46 (1989), for the proposition that procedural safeguards are required before expressive materials may be seized. However, ***Fort Wayne Books*** addressed the collection of materials by police to support an obscenity charge. In that context, the court stated that "rigorous procedural safeguards must be employed before expressive materials can be seized as "'obscene.'" ***Id.*** at 62. Here, however, Dressler

does not contend that any materials were seized to support an obscenity charge or any charges that he unlawfully possessed the seized materials. Accordingly, the complaint fails to state a claim as to WIS. STAT. § 968.13.

Dressler also contends that WIS. STAT. § 904.01, which defines "relevant evidence," and WIS. STAT. § 904.04(2), which allows other acts evidence, are unconstitutional because such evidence can include the act of possessing First Amendment-protected material and evidence of homosexual status or conduct. He argues that, at his criminal trial, the circuit court's review and admission into evidence of the seized materials was an impermissible prior restraint on free speech without the required adversary hearing. *See* ***State v. I, A Woman—Part II***, 53 Wis. 2d 102, 112-13, 191 N.W.2d 897 (1971) (explaining that "an invalid prior restraint is an infringement upon the constitutional right to disseminate matters that are ordinarily protected by the first amendment without there first being a judicial determination that the material does not qualify for first-amendment protection"). However, nothing about the rules of evidence—which allowed the admission of the seized evidence against Dressler at his homicide trial—infringes on the right to *possess* or *disseminate* those materials. Accordingly, Dressler has not stated a viable First Amendment claim based on §§ 904.01 and 904.04(2).

Dressler also argues that WIS. STAT. §§ 968.13, 904.01, and 904.04(2) violate the Equal Protection Clause. He contends that, by allowing evidence at his criminal trial of his homosexual status and conduct, the statutes criminalized protected private conduct and treated him differently under the law from persons who do not have that status or engage in that conduct. The problem with this argument, again, is that Dressler was not prosecuted for possessing any materials or for his private legal conduct. Rather, he was prosecuted for first-degree intentional homicide, and materials seized from his home and other evidence were introduced against him to

support the State's theory of motive. None of the facts asserted by Dressler set forth a viable Equal Protection claim.

Finally, Dressler argues that the application of WIS. STAT. §§ 904.01 and 904.04(2) at his trial violated the prohibition against ex post facto laws. He contends that, at his criminal trial, the rules of evidence were altered to allow evidence of his possession of materials and his homosexual status and conduct, all of which were previously legal. *See* ***Carmell v. Texas***, 529 U.S. 513, 522 (2000) (prohibited ex post facto laws include any law that "alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offen[s]e, in order to convict the offender."). However, Dressler has not alleged any facts that would establish a viable claim that the rules of evidence applied at his trial changed the law that applied at the time of the offense. Accordingly, he has not set forth a viable claim of an ex post facto violation.

Therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to 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