

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 8, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-0998

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

WILLIAM CLIFFORD,

PLAINTIFF-APPELLANT,

v.

**JAMES F. BLASK,
DET. SGT. RONALD HIRTE, SHERIFF
RONALD KRUEGER, LINCOLN COUNTY SHERIFF'S
DEPARTMENT, AND LINCOLN COUNTY,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Lincoln County:
THOMAS G. GROVER, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Fine, J.

PER CURIAM. William Clifford appeals a summary judgment that dismissed his state tort claims and 42 U.S.C. § 1983 claims against the Lincoln County district attorney, the sheriff, a sheriff's deputy, the sheriff's department,

and the County itself (hereafter “defendants”). The lawsuit claimed that defendants unlawfully kept Clifford’s guns for fourteen months as part of ongoing criminal investigations. Clifford has not clearly identified a specific constitutional violation for his § 1983 claim, and we therefore assume that he relies on the Fifth Amendment bar against taking private property without just compensation. We likewise assume that his state claim sounds in the tort of conversion of private property. The trial court correctly granted summary judgment if parties brought out no dispute of material fact and the defendants deserved judgment as a matter of law. See *Powalka v. State Life Mut. Assur. Co.*, 53 Wis.2d 513, 518, 192 N.W.2d 852, 854 (1972). We conclude that Clifford has shown no bona fide state or federal cause of action. We also conclude that defendants had various forms of immunity to the lawsuit. We therefore reject Clifford’s arguments and affirm the summary judgment.

The defendants seized Clifford’s guns as part of an arson investigation on May 18, 1994, more than seven years after the fire. The defendants were also investigating Clifford’s role in soliciting a murder. They eventually prosecuted Clifford on the soliciting murder charge, but the jury acquitted him. After the acquittal, the defendants kept the guns as part of their arson investigation. They had reason to believe that Clifford had removed these guns from his home, set fire to the home, and then submitted false claims to his home insurer for the guns and a gun cabinet. They never prosecuted Clifford for arson. However, they later prosecuted him for perjury that they claimed he committed in a civil lawsuit he filed against his home insurer on his claim for the destroyed guns and gun cabinet. Clifford won that civil lawsuit and cashed a check from the insurer for the guns and gun cabinet. Despite the arson investigation, Clifford believes that the defendants’ fourteen-month gun

possession breached his state and federal property rights. Wisconsin has a six-year statute of limitation for arson, yet the defendants kept Clifford's guns more than six years after the fire. *See* § 943.02(1)(b) & 939.74(1), STATS. Clifford believes that this disregard for the six-year limitations period helps show unlawful use by defendants of his property.

We reject Clifford's claims on their merits. Clifford has not shown that the defendants' fourteen-month possession of the guns constituted a Fifth Amendment "taking." Governments may appropriate private property for public use without running afoul of the Fifth Amendment as long as they lawfully do so under police controls necessary to protect the public health, safety, morality, and general welfare. *See Miller v. Schoene*, 276 U.S. 272, 279-80 (1928) (State of Virginia lawfully destroyed diseased, privately owned, cedar trees without compensating owners); *see also City of Milwaukee v. Arrieh*, 211 Wis.2d 764, 773-74, 565 N.W.2d 291, 294-95 (Ct. App. 1997). Here, the defendants kept Clifford's guns as part of ongoing criminal investigations. They were looking into arson, insurance fraud, and related perjury. These investigations safeguarded the public health, safety, morality, and general welfare and therefore fell outside the Fifth Amendment takings clause. For similar reasons, the defendants were not guilty of conversion. The ongoing investigation gave them a shield against tort liability. Their conduct was not unlawful under the common law of conversion; they kept within their lawful authority. *See Donovan v. Barkhausen Oil Co.*, 200 Wis. 194, 198-200, 227 N.W. 940, 941-42 (1929).

Also, the six-year arson statute of limitation did not compel a different result. This statute had not clearly run on the arson investigation. This species of arson differed from arson in the classic, common law sense. It sounded in insurance fraud and arguably did not arise until the final consummation of the

fraud, the time that Clifford cashed the insurance check. *See* § 943.02(1)(b) & 939.74(1), STATS. This act took place less than six years before the defendants returned the guns. As a result, the six-year arson limitation did not nullify the defendants' power to pursue the investigations. Further, defendants did not know with certainty what crimes the investigations would find until they finished those investigations, and the six-year arson limitation was only one part of the total puzzle. Moreover, the guns had relevance to the perjury investigation; they furnished circumstantial evidence that Clifford testified falsely about the gun cabinet. The prosecution might have been able to use the guns to bolster its perjury case, by helping demonstrate the scope of the fraud Clifford was attempting to perpetrate on the insurer and the courts. Finally, Clifford did not raise the six-year limitation in the trial court and has therefore waived it on appeal. *See Wirth v. Ehly*, 93 Wis.2d 433, 443, 287 N.W.2d 140, 145 (1980). In short, we have no grounds to reverse the summary judgment.

By the Court.—Judgment affirmed.

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

