COURT OF APPEALS
DECISION
DATED AND FILED

August 15, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP355 **Cir. Ct. No. 2011SC8742**

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

ERVIE GRAY,

PLAINTIFF-APPELLANT,

V.

M. STUTLEEN,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: DAVID T. FLANAGAN III, Judge. *Affirmed*.

¶1 BLANCHARD, P.J.[1] Ervie Gray, an inmate in the Wisconsin prison system, filed this small claims action, which includes a civil rights claim.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2011-12). All additional references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

The circuit court dismissed the action with prejudice. Gray appeals. The judgment is affirmed, because Gray fails on appeal to develop any legal arguments, a problem compounded by his additional failures: (1) to ensure that transcripts apparently central to many if not all of the arguments he intends to make are in the record and (2) to provide any reply to the defendant's substantive arguments on appeal.

BACKGROUND

¶2 Gray was pro se below and again now on appeal. He commenced this action with a small claims complaint filed in Brown County. He named as the defendant "Lieutenant M. Stutleen" and alleged a "tort/personal injury" under $5,000 and a due process violation. Gray alleged that on August 12, 2010, while Gray was held at Green Bay Correctional Institution, Lt. Stutleen of the Department of Corrections gave Gray the following choice: either approve the mailing out from the prison of various items that Gray then possessed in the prison or else prison authorities would destroy these items. Gray alleged that the mailing option was "equivalent to obliteration since once mailed out, [the items] can't be mailed back in to me."

¶3 Prison system documents attached to the complaint indicated that, before Gray was transferred from Green Bay Correctional to another facility, Gray, in consultation with Stutleen, agreed that personal property items deemed by prison rules to be in excess of the "allowed limit" would be shipped out of the prison to a person of Gray's choice.

¶4 After a Brown County Court Commissioner granted Stutleen's motion for a change of venue to Dane County circuit court pursuant to WIS. STAT. § 801.51, the Dane County circuit court dismissed the state law tort claim. The

ground for dismissal was that Gray failed to comply strictly with the Notice of Claim statute, WIS. STAT. § 893.82(3). However, the court also concluded that Gray had stated a claim for intentional deprivation of property, under color of state law, in violation of his right to due process under the Fourteenth Amendment of the United States Constitution, pursuant to 42 U.S.C. § 1983.

¶5 The surviving civil rights claim was tried to the court on February 7, 2013. Following trial, the court concluded in a written order for judgment and judgment of dismissal that Gray failed to prove a due process violation, and on that basis dismissed the complaint with prejudice.

DISCUSSION

¶6 Gray's briefing on appeal is highly disjointed and, in places, incoherent. More important, Gray fails to present a single developed legal argument, that is, an argument supported by citations to the record and legal authority that identifies any specific error by the circuit court.[2] Even granting Gray leeway based on his pro se status and on obstacles he may face in litigating while in a confined setting, significant elements of a legal argument are missing from each assertion he makes. I affirm on the ground that Gray fails to develop a legal argument.[3] *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633

[2] Much of Gray's argument appears directed at alleged errors or misconduct by prison officials but fails to show any connection between such alleged errors or conduct and any asserted *circuit court* error.

[3] Counsel for Stutleen undertakes an exceptional and commendable effort to extrapolate from the record what Gray may intend to argue on appeal, and then to address all possible arguments gleaned in this manner. Such efforts are helpful to the court and appreciated. However, given the combination of defects in Gray's briefing referenced in this opinion, I decline to search the record, "unguided by references and citations to specific testimony, to look for ... evidence to support" Gray's assertions. *See* ***Ullerich v. Sentry Ins.***, 2012 WI App 127, ¶27, 344 Wis. 2d 708, 824 N.W.2d 876 (citation and internal quotation marks omitted).

(Ct. App. 1992) (court of appeals need not consider inadequately developed arguments).

¶7 A second, independent ground on which I decline to address at least some of Gray's apparent arguments is his failure to show that he preserved each of those arguments in the circuit court. *See* ***State v. Huebner***, 2000 WI 59, ¶¶10-11, 235 Wis. 2d 486, 611 N.W.2d 727 ("It is a fundamental principle of appellate review that issues must be preserved at the circuit court. Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal. The party who raises an issue on appeal bears the burden of showing that the issue was raised before the circuit court.") (citation omitted).

¶8 Gray's failure to show that he preserved issues for appeal is closely tied to a third, independent ground for affirmance, namely, the absence of pertinent transcripts in the record. In order for this court to address the bulk of the arguments that Gray may intend to make, if not to address all his purported arguments, I would need to review transcripts of the trial or one of the hearings held by the Brown County court commissioner or the Dane County circuit court. However, these transcripts are not part of the record. For example, Gray asserts, as part of one undeveloped argument, that he signed a form related to the property at issue while "under duress." However, I lack a transcript reflecting the trial testimony of Stutleen and Gray, which would presumably bear on the issue of potential duress and might include pertinent factual findings of the circuit court. Other examples include Gray's assertions that: "I was not given a fair trial"; that the circuit court engaged in "systematic brusque interruption of" Gray's attempts to cross-examine Stutleen at trial; and that Stutleen at trial "used every semantic shenanigan testifying." Since Gray has failed to ensure that the transcripts are part of the record, this court assumes that each transcript would support all actions of

the circuit court that Gray challenges. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 27, 496 N.W.2d 226 (Ct. App. 1993) ("when an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling").

¶9 Finally, a fourth, independent ground for affirmance is that Gray fails to reply in substance to any argument made by Stutleen, thus conceding the merits of unanswered arguments. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (court of appeals may take as a concession failure in reply brief to refute proposition asserted in response brief).[4]

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[4] One possible exception is that, in a document Gray filed that I will treat, in Gray's favor, as a reply brief, Gray objects to the apparent decision of the circuit court to deny his request for an order that Dane County pay the court reporter to prepare transcripts. However, assuming without deciding that Gray has properly raised this issue in this court, Gray provides no basis on which I might question the circuit court's reasoning for denying this request.