

State of Wisconsin
Court of Appeals
District 1
Appeal No. 2016AP000005

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

In re the commitment of Kenneth William Jaworski

State of Wisconsin,

Petitioner-Respondent,

v.

Kenneth William Jaworski,

Respondent-Appellant.

**On appeal from a judgment of the Milwaukee County
Circuit Court, The Honorable Timothy Witkowiak and The
Honorable Dennis Cimpl, presiding**

Respondent-Appellant's Reply Brief

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Certification as to Length and E-Filing

Argument

I. The State has waived the argument on appeal that § 980.02(1m), Stats is the statute that controls the time of filing

For the first time on appeal, the State claims that, even if Jaworski's mandatory release date was manipulated, the petition was still timely filed because it was filed before Jaworski discharged from his sentence. (Respondent's brief p. 14) The State bases its argument on § 980.08(1m), Stats., which provides, in part, that a petition is timely if it is filed "before the person is released from prison or discharged from his sentence."

By failing to make this argument in the circuit court, though, the State has waived the argument on appeal.

Without doubt, any grounds for relief not raised in the trial court are waived on appeal. "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." *State v. Huebner*, 2000 WI 59, P10, 235 Wis. 2d 486, 611 N.W.2d 727.

The reasons for the waiver rule are obvious. As the Supreme Court explained:

The waiver rule serves several important objectives. Raising issues at the trial court level allows the trial court to correct or avoid the alleged error in the first place, eliminating the need for appeal. . . . It also gives both parties and the trial judge notice of the issue and a fair opportunity to address the objection. . . . Furthermore, the waiver rule encourages attorneys to diligently prepare for and conduct trials. . . . Finally, the rule prevents attorneys from "sandbagging" errors, or failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal. . . . For all these reasons, the waiver rule is essential to the efficient and fair conduct of our adversary system of justice.

Huebner, 2000 WI 59, 235 Wis. 2d 486, P12, 611 N.W.2d 727.

According to the State, though, the waiver rule ought not be applied to them. "It is well-established that if a trial court reaches the proper result for the wrong reason, it will be affirmed." *State v. Holt*, 128 Wis. 2d 110, 124, 382 N.W.2d 679, 687 (Ct. App. 1985).

As the next section of the brief establishes, had the State raised the issue in the circuit court, the due process violation might have been avoided.

The petition in this case does not allege that the petition was filed before Jaworski discharged from his sentence. Rather, paragraph three of the petition alleges that, "The Respondent is a person who is within 90 days of release from the sentences imposed for the sexually violent offenses set forth above. His mandatory release date is April 1, 2006."
(R:3)

II. The petition alleges that Jaworski was within ninety days of release from the sentences, and, therefore, that allegation controls whether the petition was timely filed.

As mentioned above, the petition filed in this case does not allege that § 980.02(1m), Stats establishes the deadline for filing the petition. Rather, the petition alleges that the applicable time period for filing the petition is within 90 days of Jaworski being released from prison.¹

To be sure, “The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party.” § 805.18(1), Stats.

But the applicable time limit for filing an SVP petition is a substantial right of the respondent. It is an element that must be proved at trial. See, *In re Commitment of Thiel*, 2000 WI 67, ¶ 1, 235 Wis. 2d 823, 825, 612 N.W.2d 94, 95

Here, concerning this substantial right, the petition alleged that it was filed within ninety days of Jaworski being “released from sentences.” Thus, this is what the State was required to prove in order to succeed (unless, of course, Jaworski objected to the legal sufficiency of the allegation, which he did not).

This also creates an additional reason that the court should order an evidentiary hearing. Evidently, around the time

¹ This would appear to be an error since § 980.02(1m), Stats. was in effect at the time Jaworski’s petition was filed.

the petition was filed, the State believed that the petition must be filed before Jaworski was released from prison. This would provide a motive for the State to manipulate the date on which Jaworski would be released from prison.

Dated at Milwaukee, Wisconsin, this _____ day of August, 2016.

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I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 1081 words.

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Dated this _____ day of August, 2016:

Jeffrey W. Jensen