STATE OF WISCONSIN

COURT OF APEALS

DISTRICT IV

Case No. 2018AP1525

STATE OF WISCONSIN
ex rel. MICHAEL J. VIETH,

Petitioner-Appellant,

v.

DANIEL GABLER,

Respondent-Respondent.

APPEAL FROM THE MONROE COUNTY CIRCUIT COURT, THE HONORABLE MARK L. GOODMAN, PRESIDING

BRIEF OF RESPONDENT-RESPONDENT

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INTRODUCTION

Petitioner-Appellant Michael J. Vieth filed a petition for writ of certiorari in the Monroe County Circuit Court, seeking review of Respondent-Respondent Daniel J. Gabler's decision to deny Vieth release on parole. Vieth served Gabler with a copy of the petition and a proposed, unsigned writ of certiorari. Later that day, the circuit court signed the writ, ordering Gabler to return the certified record within 30 days of service of the writ upon him. Vieth never served the signed writ on Gabler. Service of the signed writ was required for the circuit court to have personal jurisdiction over him. Because Vieth failed to effectuate proper service, the circuit court lacked personal jurisdiction over Gabler. The circuit court quashed the writ of certiorari and dismissed the case. This Court should affirm the circuit court's decision.

ISSUES PRESENTED

Did Vieth fail to obtain jurisdiction over Gabler when he did not serve him with the signed writ of certiorari?

The circuit court answered yes.

This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are unnecessary because the issues presented are fully briefed and may be resolved by applying well-established legal principles to undisputed facts.

STATEMENT OF THE CASE

On February 13, 2018, Vieth filed a petition for writ of certiorari, an affidavit of counsel, and a proposed writ of certiorari. (R. 3; 4; 5.) On the same date, Vieth served

Respondent Gabler with the petition for writ of certiorari, the affidavit, the proposed writ of certiorari, and an electronic filing notice. (R. 7; 15:1–2; 16.) The proposed writ of certiorari served on Gabler was unsigned by the Court. (R. 15:2; 16:13.)

On February 13, 2018, the circuit court signed the writ of certiorari. (R. 6.) The writ commanded the respondent to provide a certified return "within thirty (30) days after service of this writ upon you." (R. 6.) Vieth never served the signed writ on Gabler. (R. 7; 15:2.)

On February 28, 2018, counsel for Gabler filed a notice of appearance, "subject to and without waiving any objections to jurisdiction or to the Court's competency to proceed," and requested that "service of all pleadings and other papers be made upon" counsel. (R. 8.) The notice was filed electronically, as required by statute. *See* Wis. Stat. § 801.18(3)(a). Vieth's attorney then received an automatically generated email, notifying him that Gabler's attorney had "registered as an electronic notice party and has agreed to file any documents and receive all communications from the court for this case electronically." (R. 18:1–2.) The notice further stated: "You will no longer need to provide traditional paper documents to this party. You still need to provide traditional paper documents to any other parties who are not electronic notice parties." (R. 18:2.)

On May 22, 2018, Vieth filed a proposed order to show cause for contempt, an affidavit of counsel in support of the order to show cause, and a proposed order. (R. 9; 10, 11.) On May 23, 2018, the circuit court ordered Gabler to show cause why he should not be held in contempt based on his failure to provide a certified return. (R. 12.)

On May 24, 2018, Gabler filed a motion to quash the writ of certiorari and a response to the order to show cause. (R. 13–16.) Gabler argued that the court lacked personal

jurisdiction over him because he had not been served with the signed writ of certiorari. (R. 14.)

The court heard both motions on July 19, 2018. (R. 22; 32.) The court concluded that Vieth had failed to properly serve Respondent Gabler:

> The Court concludes that service of an unsigned proposed writ constitutes a fundamental error under the test of [*Am. Family Mut. Ins. Co. v. Royal Ins. Co. of Am.*, 167 Wis. 2d 524, 481 N.W.2d 629 (1992)]. The Court concludes this action was not properly commenced under 801.02 because a fully authenticated, signed writ was never personally served on the Respondent.

(R. 32:7.) The court granted Gabler's motion to quash and denied Vieth's order to show cause. (R. 24; 32:7.) This appeal followed. (R. 25.)

STANDARD OF REVIEW

This Court reviews a motion to quash a writ of certiorari de novo. *State ex rel. Myers v. Swenson*, 2004 WI App 224, ¶ 6, 277 Wis. 2d 749, 691 N.W.2d 357.

SUMMARY OF THE ARGUMENT

After Vieth filed his petition for writ of certiorari and the circuit court issued the writ, Vieth was required to serve the signed writ on Gabler within 90 days. There is no dispute that he did not do so. His failure to serve the signed writ was a fundamental defect in service that did not confer personal jurisdiction over Gabler.

Nothing Gabler did or did not do changes this. Gabler's notice of appearance did not waive jurisdictional defects, and the fact that he filed his notice of appearance electronically does not mean that he consented to electronic service of the writ. The advent of electronic filing did not change the substantive law about when personal service is required for

purposes of commencing the action and obtaining jurisdiction over the respondent. Vieth failed to obtain jurisdiction over Gabler when he did not serve him with the signed writ. The circuit court's decision dismissing this case should be affirmed.

ARGUMENT

Vieth failed to obtain jurisdiction over Gabler when he did not serve him with the signed writ of certiorari.

A. Vieth failed to serve the signed writ of certiorari on Gabler within 90 days after the writ was issued.

A circuit court obtains personal jurisdiction over a defendant in a civil action—including a certiorari action—when the defendant is served in the manner prescribed by statute. *Hagen v. City of Milwaukee Emp.'s Ret. Sys. Annuity & Pension Bd.*, 2003 WI 56, ¶ 12, 262 Wis. 2d 113, 663 N.W.2d 268; *Irby v. Young*, 139 Wis. 2d 279, 281, 407 N.W.2d 314 (Ct. App. 1987) (a writ of certiorari is a civil action). Actual notice of the pending action is not sufficient to confer personal jurisdiction. *Danielson v. Brody Seating Co.*, 71 Wis. 2d 424, 429, 238 N.W.2d 531 (1976). Wisconsin requires strict compliance with its rules of statutory service, even though the consequences may appear to be harsh. *Bergstrom v. Polk Cty.*, 2011 WI App 20, ¶ 12, 331 Wis. 2d 678, 795 N.W.2d 482 (quotations and citations omitted).

There are three ways to commence an action seeking certiorari review:

> First, the action may be commenced under [§ 801.02] sub. (1), which permits use of a summons and a complaint. Second, the action may be commenced by service of an appropriate original writ. Third, the action may be commenced by filing a complaint if

> service of the complaint and of an order is made upon the defendant.

Nickel River Invs. v. City of La Crosse Bd. of Review, 156 Wis. 2d 429, 431–32, 457 N.W.2d 333 (Ct. App. 1990) (citing Wis. Stat. § 801.02(5)) (quotations omitted). By obtaining a writ of certiorari, Vieth elected the second method.

The Prison Litigation Reform Act requires that a prisoner's action be commenced within 45 days of the issuance of the final decision challenged. Wis. Stat. § 893.735(2). For the purposes of the 45-day time limit, the action is "commenced at the time that the prisoner files a petition seeking a writ of certiorari with a court." Wis. Stat. § 893.735(3) (specifically governing prisoner certiorari actions); *see State ex rel. Hensley v. Endicott*, 2001 WI 105, ¶¶ 20–21, 245 Wis. 2d 607, 629 N.W.2d 686 (statutes specifically governing prison litigation control over more general statutes).

Filing the petition commences the action *only* for the purposes of the 45-day time limit set forth in Wis. Stat. § 893.735. *See* Wis. Stat. § 893.735(3).[1] For all other purposes, including obtaining personal jurisdiction over the respondent, commencement is measured by service of the writ, or other initiating documents, on the respondent. *See* Wis. Stat. § 801.02(5).

After the prisoner files his petition for writ of certiorari, he must still obtain personal jurisdiction over the respondent pursuant to Wis. Stat. § 801.11(1)(a), which requires personal service. The petitioner is responsible for

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[1] "*In this section*, an action seeking a remedy available by certiorari is commenced at the time that the prisoner files a petition seeking a writ of certiorari with the court." Wis. Stat. § 893.735(3) (emphasis added).

obtaining a writ from the court and serving it on the respondent. *State ex rel. Dep't of Nat. Res. v. Walworth Cty. Bd. of Adjustment,* 170 Wis. 2d 406, 419, 489 N.W.2d 631 (Ct. App. 1992).

The general statute applicable to certiorari proceedings contains a 90-day deadline to serve a summons and complaint. Wis. Stat. § 801.02(1). When proceeding by writ, Wis. Stat. § 801.02(5) contains no service deadline of its own; rather, it references sub. (1). Thus, a reading of Wis. Stat. § 801.02(1) and (5) reveals that an original, signed writ should be served within 90 days after the court issues the writ. Failure to serve the respondent within 90 days is fatal to the action because the court lacks personal jurisdiction over the respondent. *Hagen,* 262 Wis. 2d 113, ¶ 13; *see also* Wis. Stat. § 801.15(2) (prohibiting courts from enlarging the 90-day time period in § 801.02(1)).

Here, the circuit court signed the writ of certiorari on February 13, 2018. (R. 6.) Yet Vieth never served Gabler with the signed writ. (R. 7; 15:2.) Failure to serve the signed writ on Gabler was fatal to his action because it is well beyond the 90-day service limit.

B. Vieth's failure to serve the signed writ was a fundamental defect in service that did not confer personal jurisdiction over Respondent Gabler.

Whether a defect in service is fatal to personal jurisdiction depends on whether the error is "fundamental" or "technical." *Burnett v. Hill,* 207 Wis. 2d 110, 121–22, 557 N.W.2d 800 (1997). An error is fundamental where there is a failure to meet the burden set out in Wis. Stat. § 801.02(1). *Am. Family Mut. Ins. Co. v. Royal Ins. Co. of Am.,* 167 Wis. 2d 524, 533, 481 N.W.2d 629 (1992). For example, failing to serve a summons and complaint within the appropriate timeframe is a fundamental error.

Id. at 533–34. An error is technical when, for example, there is a defect in the form of the summons and complaint.[2] Technical errors require an assessment of whether the defect resulted in prejudice to the defendant. *Id.* at 533. But when the error is fundamental, the existence of prejudice is irrelevant. *Id.* at 534–35.

Here, there was no technical error in the form of the writ; it was simply never served on Gabler. The fact that Vieth served a proposed writ is of no importance because he was statutorily required to serve the signed writ on Gabler within 90 days. *See* Wis. Stat. § 801.02(1), (5). The writ ordered Gabler to return the certified record "within thirty (30) days after service." (R. 6.) Thus, even the writ itself indicated that service was required. Vieth's failure to serve the signed writ resulted in a fundamental defect in service that did not confer personal jurisdiction on Gabler.

C. Gabler's notice of appearance did not waive jurisdictional defects.

Vieth contends that the notice of appearance filed by Gabler's attorney in the circuit court waived defects in personal jurisdiction. (Appellant Br. 16–19.) He claims that

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[2] *See, e.g., Burnett v. Hill*, 207 Wis. 2d 110, 125, 557 N.W.2d 800 (1997) (mailing an unauthenticated copy of a publication summons along with authenticated copies of the original summons and complaint was a technical defect); *Gaddis v. LaCrosse Prod., Inc.*, 198 Wis. 2d 396, 407–08, 542 N.W.2d 454 (1996) (serving an unsigned summons with a signed complaint was a technical defect); *Schlumpf v. Yellick*, 94 Wis. 2d 504, 511, 288 N.W.2d 834 (1980) (serving an amended summons and complaint with the wrong filing number was a technical defect); *Canadian Pac. Ltd. v. Omark-Prentice Hydraulics*, 86 Wis. 2d 369, 373, 272 N.W.2d 407 (Ct. App. 1978) (serving a summons that omitted stating that the defendant must answer within 20 days was a technical defect).

to preserve his jurisdictional defense, Gabler was required to file a "special appearance," whereby he appeared specifically to contest personal jurisdiction. (Appellant Br. 9–10, 16–19.) This is incorrect.

Wisconsin Stat. § 801.06 provides, in part, that a court having jurisdiction over the subject matter of an action may exercise personal jurisdiction "over any person who appears in the action and waives the defense of lack of jurisdiction over his or her person as provided in [Wis. Stat. § 802.06(8)]." Under Wis. Stat. § 802.06(8), a defense based on a lack of jurisdiction or insufficiency of service of process is waived only if the defendant fails to raise the defense in a motion or responsive pleading.

This statutory procedure has supplanted the special appearance procedure, which no longer applies in Wisconsin. *Honeycrest Farms, Inc. v. A.O. Smith Corp.*, 169 Wis. 2d 596, 602–03, 486 N.W.2d 539 (Ct. App. 1992). "[A]ppearances in an action do not waive a personal jurisdiction defense." *Useni v. Boudron*, 2003 WI App 98, ¶ 12, 264 Wis. 2d 783, 662 N.W.2d 672. Filing motions, appearing at hearings, and even attempting to argue claims on the merits do not waive the right to object to lack of personal jurisdiction. *Id.* As long as a defendant properly raises the jurisdictional defense in a motion or responsive pleading, the defendant may take part in the proceedings without fear of having waived the defense. *Dietrich v. Elliott*, 190 Wis. 2d 816, 825, 528 N.W.2d 17 (Ct. App. 1995).

Gabler's notice of appearance did not waive defects in personal jurisdiction. Gabler explicitly appeared "subject to and without waiving any objections to jurisdiction or to the Court's competency to proceed." (R. 8.) Although this statement was unnecessary under the statutory framework, a more clear assertion and preservation of the jurisdictional defense is hard to imagine. Gabler then moved to quash the writ of certiorari, arguing that the court lacked personal

jurisdiction over him because he had not been served with the signed writ of certiorari. (R. 14.) Gabler's motion preserved the jurisdictional defense and permitted him to take other actions—including appearing at hearings and responding to the order to show cause—without waiving the defense. *See* Wis. Stat. § 802.06(8).

Vieth cites *Milwaukee County v. Schmidt, Garden & Erickson*, 35 Wis. 2d 33, 150 N.W.2d 354 (1967), in support of his waiver argument. (Appellant Br. 17–18.) In *Schmidt*, the plaintiff failed to serve a verified copy of the complaint when it served the summons on the defendants. 35 Wis. 2d at 34. Rather than raising the jurisdictional defect by motion, one of the defendants sent the plaintiff's counsel a letter, demanding a copy of the complaint, which the plaintiff immediately served on the defendants. *Id.* The supreme court concluded that the defendants waived their right to object to jurisdiction when they demanded a copy of the complaint and did not indicate any intention to preserve their jurisdictional defense. *Id.* at 37–38.

Schmidt does nothing to help Vieth's cause. Here, Gabler filed a notice of appearance and motion to quash objecting to personal jurisdiction. Unlike in the defendant in *Schmidt*, he did not ask Vieth to send him the writ or otherwise consent to service by some other method. (R. 8; 13–16.) Gabler did not waive his right to object to the defect in personal jurisdiction.

D. The fact that Gabler filed his notice of appearance electronically does not change anything.

Gabler was not personally served with the signed writ, and his notice of appearance did not waive this fundamental error in obtaining personal jurisdiction. Vieth argues that the fact that Gabler filed his notice of appearance *electronically* changes all this. He claims that by opting in to

electronic filing, Gabler waived personal service and consented to personal jurisdiction. (Appellant Br. 9–16, 19–21.) There is no support for Vieth's position.

The statutory requirements for electronic filing in the circuit court are set forth in Wis. Stat. § 801.18. That section includes a subsection on commencing an action. Wis. Stat. § 801.18(5). Nothing in that subsection—or elsewhere in the statute—changes "the substantive law about when personal service is required for purposes of commencing the action and obtaining jurisdiction over the defendant or respondent." 2016 Comments to Wis. Stat. § 801.18(5). The petitioner is still required to obtain jurisdiction over the respondent by personally serving him with the signed writ, or other initiating document. Wis. Stat. § 801.02(5). There is no dispute that Vieth did not comply with the statutory requirements for service.

Vieth's argument that electronic filing changes the requirements for personal service is raised throughout his brief. (Appellant Br. 9–16, 19–21.) Each of his main points are addressed below.

First, Vieth argues that by electronically filing his notice of appearance, Gabler waived personal service of the signed writ. He points to Wis. Stat. § 801.18(6)(b), which reads: "If a document other than an initiating document requires personal service, it shall be served by traditional methods unless the responding party has consented in writing to accept electronic service or service by some other method." (Appellant Br. 11–13.) Subsection (6)(b) does not apply because the original, signed writ is an initiating document in a certiorari action. Wis. Stat. § 801.02(5); *see supra* at 4–5. Instead, subsection (5)(b) applies. Under that subsection, the responding party can also waive personal service of initiating documents by consenting in writing to some other service method. Wis. Stat. § 801.18(5)(d). But, as discussed above, simply filing a notice

of appearance does not effectuate such a waiver and electronic filing does not change that. *See supra* at 7–9.

Second, Vieth argues that he was justified in relying on the court's automatically-generated email, notifying him that Gabler's attorney had registered as an electronic filer and that Vieth would "no longer need to provide traditional paper documents to this party." (R. 18:2.) (Appellant Br. 13–16.) This notice does not apply to initiating documents required to be personally served for the purposes of obtaining jurisdiction over the respondent. *See* 2016 Comments to Wis. Stat. § 801.18(5). It applies to non-initiating documents subsequently filed pursuant to Wis. Stat. § 801.14.

An example illustrates the absurdity of Vieth's position. Gabler's attorney was required to file her notice of appearance—and any other document—electronically. *See* Wis. Stat. § 801.18(3)(a) (electronic filing mandatory for licensed Wisconsin attorneys). If counsel had decided to forgo a notice of appearance and had simply filed her motion to quash for lack of personal jurisdiction, the same email notice would have generated, leaving Gabler with no ability to challenge jurisdiction without waiving it under Vieth's theory. Electronic filing cannot result in automatic waiver of jurisdictional defects. Vieth's reliance on the automatically-generated email was misplaced.

Third, Vieth contends that Gabler should be estopped from raising any jurisdictional defense because, by electronically filing his notice of appearance, Gabler "induced reasonable reliance by Mr. Vieth that he should not serve Mr. Gabler personally, and that Mr. Gabler accepted electronic service of the signed Writ by opting in to the electronic record." (Appellant Br. 19–20.) Vieth's failure to personally serve Gabler with the signed writ, as required, deprived the court of jurisdiction to address any estoppel argument. Principles of equitable estoppel cannot be used as

a basis for personal jurisdiction where none previously existed. *Sacotte v. Ideal-Werk Krug & Priester Machinen-Fabrik*, 119 Wis. 2d 14, 17–18, 349 N.W.2d 701 (Ct. App. 1984).

Fourth, Vieth concedes that he was required to serve Gabler with the signed writ within 90 days. (Appellant Br. 10, 11, 15–16.) He argues, however, that when Gabler opted in to electronic filing during the 90-day service period, Vieth had no way to electronically serve him with the writ that was already a part of the electronic record. So, he reasons, Gabler must have automatically accepted service of the writ. (Appellant Br. 9–10, 15–16.)

This argument is based on the premise that opting in to electronic filing waives the personal service requirement. As discussed above, that premise is incorrect. *See supra* at 9–10. The reason there is no way to electronically serve the writ is because Vieth was required to personally serve it. *See* Wis. Stat. § 801.02(5). After the judge electronically signed the writ, Vieth should have printed it and served it on Gabler, just as he would have done if the case had not been filed electronically. *See* Wis. Stat. § 801.02(5); § 801.18(10) (authenticated copies of initiating documents may be printed from the case management system). Electronic filing does not "change the way attorneys practice law," as Vieth suggests. (Appellant Br. 9.) The laws for obtaining personal jurisdiction are exactly the same. Vieth just failed to comply with them.

Finally, it is important to remember that Vieth was not litigating this case pro se, like most prisoners do. He was represented by experienced counsel throughout the process. And Vieth is not left without a remedy going forward. He

has had a subsequent parole hearing and is currently seeking certiorari review of that decision.[3]

CONCLUSION

The circuit court's order dismissing this case for improper service should be affirmed.

Dated this 3rd day of December, 2018.

Respectfully submitted,

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[3] *State ex rel. Vieth v. Gabler*, No. 18-CV-237 (Wis. Cir. Ct. Monroe Cty.), *available at* https://wcca.wicourts.gov/caseDetail.html?caseNo=2018CV000237&countyNo=41&index=0. This Court may take judicial notice of electronic circuit court docket entries. *See Kirk v. Credit Acceptance Corp.*, 2013 WI App 32, ¶ 5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522.

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,599 words.

Dated this 3rd day of December, 2018.

KARLA Z. KECKHAVER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 3rd day of December, 2018.

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