STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2018AP1525

STATE EX REL.
MICHAEL J. VIETH,

Petitioner-Appellant,

v.

DANIEL J. GABLER,

Respondent-Respondent.

REPLY BRIEF OF PETITIONER-APPELLANT MICHAEL J. VIETH

On appeal from Monroe County Circuit Court,
The Honorable Mark L. Goodman, Presiding.

Michael J. Vieth, *Petitioner-Appellant*
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I. INTRODUCTION

The facts in this case are not in dispute;[1] however, Mr. Gabler fails to address the issue most critical to the court - what do rules governing service require, where the litigant would have had to serve the opposing party in order to establish jurisdiction, but opposing counsel had already registered and demanded electronic service, which the court ordered as well, prior to the litigant effecting personal service of traditional paper copies upon the opposing party?

Mr. Gabler starts and ends his analysis with one point: that a paper copy of the signed writ was never served upon Mr. Gabler. This fact is not in dispute; rather, it is the effect of Mr. Gabler's Notice of Appearance that is in dispute in this action. Mr. Gabler asserts, without support, that "Nothing Gabler did or did not do changes this." Brief of Respondent-Respondent at 3. However, Mr. Gabler filed a document with the court in which he requested that service be made upon his counsel and he also consented to electronic service. The court

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1 It should be clarified, however, that Mr. Vieth sought certiorari review of Mr. Gabler's elevation of his deferral of parole consideration from 6 months to 12 months; he is not challenging Mr. Gabler's decision to deny Vieth release on parole, as Respondent-Respondent asserts in his response brief. *See* Brief of Respondent-Respondent at 1.

also directed Mr. Vieth not to serve traditional paper copies on Mr. Gabler, and yet Mr. Gabler asserts that he should have been served with traditional paper copies. Mr. Gabler's argument, in essence, is that Mr. Vieth should have ignored Mr. Gabler's demand for electronic service and for service on his counsel - rather than on him personally - and also ignored the court's order mandating electronic service and, instead, should have served Mr. Gabler with the traditional paper copies he'd told the court he didn't want. This court should not penalize Mr. Vieth's compliance with counsel's demand and the court's order.

II. ISSUES

A. The action was commenced at the time the petition was filed in the circuit court and Gabler was served with the initiating documents.

Mr. Gabler argues that the action actually commenced when the signed writ was issued. He's wrong. He is, however, right about one thing: specific statutes control over general statutes. WIS. STAT. § 893.735(3) is the statutory section which specifically addresses writs of certiorari. This section states:

> 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).

The general statute, § 801.02, agrees with § 893.735(3):

> A civil action in which a personal judgment is sought is commenced as to any defendant when a summons and complaint naming the person as defendant are filed with the court, provided service of an authenticated copy of the summons and of the complaint is made upon the defendant under this chapter within 90 days of filing.

WIS. STAT. § 801.02(1). Both statutory sections clearly establish that an action is commenced when the summons and complaint is filed with the court and served upon the defendant.

Case law agrees. An action is commenced at the time the petition and proposed writ of certiorari are filed. *See State ex rel. Shimkus v. Sondalle*, 2000 WI App 238, ¶ 2, 239 Wis. 2d 237, 620 N.W.2d 409 ("... [A]n action is 'commenced' within the meaning of the law 'at the time that the prisoner files a [certiorari] petition . . . with a court.'). Mr. Gabler's reliance upon § 801.02(5) is misplaced, as it addresses something quite different:

> An action seeking a remedy available by certiorari, quo warranto, habeas corpus, mandamus or prohibition ***may*** be commenced under sub. (1), by service of an appropriate original writ on the defendant named in the writ if a copy of the writ is filed forthwith, or by filing a complaint demanding and specifying the remedy, if service of an authenticated copy of the complaint and of an order

> signed by the judge of the court in which the complaint is filed is made upon the defendant under this chapter within the time period specified in the order. The order may specify a time period shorter than that allowed by s. 802.06 for filing an answer or other responsive pleading.

WIS. STAT. § 801.02(5) (emphasis added). This section is not specific to just writs of certiorari, and it does not address the same thing as §§ 801.02(1) or 893.735(3); it provides alternative, but not the exclusive, methods of commencing one of the listed actions - this is indicated by the use of the permissive indicator "may" in § 893.735(3). *See City of Wauwatosa v. Milwaukee Cty.*, 22 Wis. 2d 184, 191, 125 N.W.2d 386 (1963) ("Generally in construing statutes, 'may' is construed as permissive and 'shall' is construed as mandatory . . . "). The manner of commencing an action addressed in sub. (5) also cannot be read in isolation from the next sentence, which addresses a situation in which the judge has specified a time period shorter than that allowed by § 802.06, and directs that in such a situation, the action may be commenced in this way.

Gabler asserts that "Filing the petition commences the action only for the purposes of the 45-day time limit . . ." Brief of Respondent-Respondent at 5. Mr. Gabler cites no authority for this proposition, and

it should be noted that this alleged limitation of the scope of the statutory section is not found anywhere within WIS. STAT. § 893.735.

Conflicts between statutes are disfavored. If possible, the statutes should be construed in a manner that serves each statute's purpose. *Moran v. Quality Aluminum Casting Co.*, 34 Wis. 2d 542, 553, 150 N.W.2d 137 (1967) (modified on other grounds by *Fitzgerald v. Meissner & Hicks, Inc.*, 38 Wis. 2d 571, 157 N.W.2d 595 (1968)). However, it is well-settled law that where two statutes conflict, the more specific controls. *Jones v. State*, 226 Wis. 2d 565, 576, 594 N.W.2d 738 (1999). WIS. STAT. § 893.735 specifically governs prisoner certiorari actions, as Mr. Gabler admits in his brief. Brief of Respondent-Respondent at 5. Gabler also admits that statutes specifically governing prison litigation control over more general statutes. *See id.*; *see also* WIS. STAT. § 893.735(3); *State ex rel. Hensley v. Endicott*, 2001 WI 105, ¶¶ 19-21, 245 Wis. 2d 607, 629 N.W.2d 686; *Martineau v. State Conservation Comm'n*, 46 Wis. 2d 443, 449, 175 N.W.2d 206 (1970).

The documents initiating Mr. Vieth's certiorari action were the Petition for Writ of Certiorari, Affidavit of Stephen P. Hurley, Proposed

Writ of Certiorari, and the Electronic E-filing Notice.[2] It in undisputed that these documents were served upon Kris Chilsen, an authorized representative for Mr. Gabler. (R. 7:1-2; 14:2; 15:1-2).

B. Gabler ignores the fact that he inserted himself into the action, requested service upon counsel instead of him, and consented to electronic service.

Since the petition was the initiating document, the signed Writ of Certiorari needed to be served upon Mr. Gabler ***unless*** he consented in writing the accept electronic service or service by some other method:

> 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.

WIS. STAT. § 801.18(6)(b) (emphasis added).[3] Mr. Gabler's Notice of Appearance in the action provided written consent to electronic service:

> Respondent, Daniel J. Gabler, appears in this action by his

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[2] Indeed, WIS. STAT. § 801.18(5)(d) states "Initiating documents shall be served by traditional methods ***unless*** the responding party has consented in writing to accept electronic service by some other method. Initiating documents shall be served together with a notice to the responding party stating that the case has been electronically filed and with instructions for how to use the electronic filing system." (emphasis added).

[3] The petition for the writ was the initiating document, and a certified copy of the signed writ, to be served on Mr. Gabler, was a document "other" than that.

> attorneys ... ***and requests that service of all pleadings and other papers be made upon Assistant Attorney General Sandra L. Tarver as counsel of record...***

(R. 8:1-2) (emphasis added). Resultantly, the court directed Mr. Vieth's counsel:

> Sandra Lynn Tarver has registered as an electronic notice party and has agreed to file any documents and receive all communications from the court for this case electronically. ***You will no longer need to provide traditional paper documents to this party.***[4]

(R. 18:2) (emphasis added). Ms. Tarver offered no correction or objection in response. Her request and the court's order are simple, unambiguous and understandable to a layman. Mr. Vieth should not be penalized for relying upon requests made by Gabler and the court's notice that traditional paper copies no longer needed to be served upon Mr. Gabler.

Mr. Gabler attempts a *reducto ad absurdum* which mischaracterizes Mr. Vieth's arguments and is inapt. *See* Brief of Respondent-Respondent at 11. Mr. Gabler asserts that:

> If counsel had decided to forgo a notice of appearance and had simply filed her motion to quash for lack of personal

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[4] Note that the Order's use of "traditional" to describe the type of paper document that need not be provided is the word employed in WIS. STAT. § 801.18(6)(b) to describe the kind of paper document one need no longer serve.

> jurisdiction, the same email notice would have generated, leaving Gabler with no ability to challenge the jurisdiction without waiving it under Vieth's theory.

Id. Mr. Vieth is not arguing that electronic filing would result in an automatic waiver of jurisdictional defects. Mr. Gabler entered a special appearance to preserve jurisdictional defects and that notice suffices to do so. However, no defect had yet occurred because the time for personal service had not expired. There was no requirement to file a notice of appearance or to opt into the electronic file before paper service was effected. By having chosen to do so before paper service was effected, Gabler accepted service and waived his right to receive a paper copy of the signed writ. If there are any other jurisdictional defects, objections to them are preserved; but he has waived objection - and is estopped from asserting objection - to not having been served a paper copy of the electronically signed writ.

Further, it should be noted that counsel had access to every document within the electronic file. Electronic filing has changed the way in which attorneys practice - Gabler could rely upon the writ found within the electronic file, since there was no danger of a false copy. *See Burnett v. Hill*, 207 Wis. 2d 110, 123, 557 N.W.2d 800 (1997)

("The purpose of authentication is to provide assurance to those served with the summons that the copies served are true copies of documents filed with the court, and to provide a case number for future proceedings in the matter."). Not only was the purpose of service accomplished when Gabler inserted himself into the action and had the signed writ issued by the court, but service itself was effected: Gabler affirmatively accepted access to the electronic record, and that system provides no means of additional service for documents already filed.

C. Gabler persists in arguing that Vieth has a remedy going forward, despite this Court having already ruled on this issue and having declined to dismiss the appeal as moot.

This court has already denied Mr. Gabler's Motion to Supplement the Record and to Dismiss the Appeal as Moot:

> Gabler argues that Vieth's appeal is moot because, even if Gabler acted arbitrarily and unreasonably in his December 2017 decision, Vieth already received the appropriate remedy of a new parole hearing, namely the August 2018 hearing. Vieth disagrees, arguing that the commission who conducted the August 2018 hearing relied on findings or conclusions from Gabler's December 2017 decision. Vieth points to the transcript from the hearing, which provides support for the view that the commissioner making the August 2018 decision relied on Gabler's December 2017 decision . . . In sum, Gabler does not show that Vieth's appeal is moot because Gabler does not show that Vieth's underlying challenge to Gabler's December 2017 decision is moot.

See Order of Court of Appeals dated October 8, 2018. The fact that Mr. Vieth is seeking certiorari review of his subsequent parole hearing should have no bearing on the Court's decision in this appeal.

III. CONCLUSION

Mr. Gabler's action of entering the action after having been served with the petition, which were the initiating documents, should be deemed an acceptance of service. The order of the circuit court dismissing Mr. Vieth's writ of certiorari should be **REVERSED** and the case should be **REMANDED FOR FURTHER PROCEEDINGS**.

Dated this 18th day of December, 2018.

Respectfully submitted,

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IV. FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in WIS. STAT. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,720 words.

Dated this 18th day of December, 2018.

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V. CERTIFICATION OF ELECTRONIC COPY

Pursuant to WIS. STAT. § 809.19(12)(f), the undersigned hereby certifies that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated this 18th day of December, 2018.

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