STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP2142

In re the commitment of Tavodess Matthews:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

TAVODESS MATTHEWS,

Respondent-Appellant.

On Appeal from a Non-Final Order Denying Judicial Substitution, Entered in the Milwaukee County Circuit Court, the Honorable Michelle A. Havas and Maxine A. White, Presiding.

BRIEF AND APPENDIX OF RESPONDENT-APPELLANT

DUSTIN C. HASKELL
Assistant State Public Defender
State Bar No. 1071804

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
haskelld@opd.wi.gov
Attorney for Respondent-Appellant

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

OTHER AUTHORITIES CITED

ISSUE PRESENTED

> By statute, the circuit court was required to hold a probable cause hearing on the State's ch. 980 petition within 10 days of Mr. Matthews' release from prison. On the day of the hearing, Mr. Matthews' counsels sought an extension of the statutory timeline because they needed more time to consult with Mr. Matthews. The circuit court granted the adjournment. By granting the adjournment, did the circuit court rule on the "preliminary contested matters" in the case, thereby extinguishing Mr. Matthews' right to seek substitution under Wis. Stat. § 801.58(1)?

The circuit court judge originally assigned to the case denied the request for substitution as untimely. The chief judge affirmed that decision.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Matthews does not request publication because this case involves the application of settled precedent to an undisputed set of facts. Mr. Matthews welcomes the opportunity for oral argument if the court would find it helpful.

STATEMENT OF THE CASE AND FACTS

On July 27, 2018, the State filed a petition to commit Tavodess Matthews under ch. 980. (1.) Before Mr. Matthews was served with the petition, the court made a statutorily-required *ex parte* finding of probable cause. Wis. Stat. § 980.04(1); (2; 3.) As a result of that finding, Mr. Matthews was temporarily detained until a contested probable cause hearing could be held under Wis. Stat. § 980.04(2). (2.)

When the petition was filed, Mr. Matthews was still serving a sentence at Green Bay Correctional Institution. (*See* 3); Offender Locator, https://appsdoc.wi.gov/lop/detail.do (search for Tavodess Matthews; then follow "Movement" hyperlink). That meant the court had to hold a probable cause hearing within 10 days of his scheduled release. Wis. Stat. § 980.04(2)(b)2. Mr. Matthews was released on August 7, 2018, and a hearing was scheduled for August 15, 2018. *Id.*; (13:3).

At beginning of the hearing, Mr. Matthews' counsels requested an adjournment, explaining that they had only been able to meet with Mr. Matthews earlier that day, and that they needed more time to consult with Mr. Matthews to be prepared for the probable cause hearing. (13:2-3; App. 105-06.) The State objected "for the record," but conceded its only witness was not present. (13:3-4; App. 106-07.) The State told the witness not to come after hearing from Mr. Matthews' counsels that they would be requesting an adjournment. (*Id.*)

The statute requiring a probable cause hearing within ten days of discharge also permitted the trial court to extend that deadline "for good cause shown upon its own motion, the motion of any party, or the stipulation of the parties." Wis. Stat. § 980.04(2)(b)2.[1] The court found good cause, confirmed that the defendant consented to the extension, and adjourned the hearing. (13:4-6; App. 107-09.)

Before the next hearing, Mr. Matthews filed a request for substitution pursuant to Wis. Stat. § 801.58(1). (4; App. 122.) That statute permits a party to request substitution so long as the request is made (1) within 60 days of service on the party, and (2) before "the hearing of any preliminary contested matters." Wis. Stat. § 801.58(1).

At the hearing, the State objected to substitution, but stated no grounds for the objection. (14:2; App. 114.)

---

[1] The full statute reads: "If the person named in the petition is in custody under a sentence, dispositional order, or commitment and the probable cause hearing will be held after the date on which the person is scheduled to be released or discharged from the sentence, dispositional order, or commitment, the probable cause hearing under par. (a) shall be held no later than 10 days after the person's scheduled release or discharge date, excluding Saturdays, Sundays, and legal holidays, unless that time is extended by the court for good cause shown upon its own motion, the motion of any party, or the stipulation of the parties." Wis. Stat. § 980.04(2)(b)2.

The court denied the request for substitution as untimely, concluding that it had already resolved a "preliminary contested matter" when it extended the time for a probable cause hearing:

> I do believe Mr. Matthews has this [substitution] right; however, because we had a hearing scheduled for August 15, 2018, at which time the State was ready to proceed—I believe they had—they had their witness here or told their witness they didn't need to appear based on the representations made by counsel late that morning, I believe, that the State objected to the adjournment request at that time.
>
> I took from Mr. Matthews a waiver of time limits. That is a substantive decision that I made; therefore, I don't believe that this is timely filed.

(14:3; App. 115.) Mr. Matthews' counsels stated they would seek review of the court's decision by the chief judge pursuant to Wis. Stat. § 801.58(2). (14:4-5; App. 116-17.) The court then supplemented its ruling, explaining that its *ex parte* order was also a preliminary contested matter:

> If we could just supplement the record here, in my analysis, I spoke of the time limits as it related to the—as the contested substantive issue. I have additionally done an *Arends* review when the petition was originally filed and signed findings and orders—or findings and order that relate to this matter, so I believe that is also a substantive issue that has been raised.

(14:7; App. 119.)

Mr. Matthews filed a petition with the chief judge, arguing his substitution request was timely, and that adjourning the probable cause hearing was not a preliminary contested matter within the meaning of Wis. Stat. § 801.58(1). (6.) He pointed out that reviewing courts required a decision to relate to the substantive issues in the case before it could be deemed a preliminary contested matter. (6:4 (citing *DeWitt Ross & Stevens, S.C. v. Galaxy Gaming & Racing Ltd. P'ship*, 2003 WI App 190, ¶¶ 37-38, 267 Wis. 2d 233, 670 N.W.2d 74, aff'd in part, rev'd in part, 2004 WI 92, 273 Wis. 2d 577, 682 N.W.2d 839)).

The chief judge affirmed the denial of substitution. The court agreed that a preliminary contested matter must relate to the substantive issues in the case. (7:2; App. 102.) However, the court found that extending the deadline to hold the probable cause hearing was a substantive issue in the case:

> The court granted Mr. Matthews' request and adjourned the matter. In doing so, the court addressed and decided the substantive issue of whether Mr. Matthews could waive his statutory right to a timely hearing, and the outcome of the court's decision directly affected the presentation of Mr. Matthews' case within the meaning of Wis. Stat. § 801.58(1).

(7:2; App. 102.)

Mr. Matthews petitioned this court for leave to appeal the non-final order on substitution. The court granted that petition.[2]

ARGUMENT

I. Mr. Matthews' substitution request came before the court decided any substantive issues in the case; therefore, the circuit court was required to grant substitution.

Mr. Matthews requested substitution before the court resolved any substantive issues in the case, so this court should reverse. This case turns on whether the circuit court ruled on a "preliminary contested matter" under Wis. Stat. § 801.58(1) when it granted Mr. Matthews' request to adjourn the probable cause hearing.

The Wisconsin Supreme Court has repeatedly held that "preliminary contested matters" encompass only *substantive* decisions that "could have implicated the merits of the case." *State ex rel. Sielen v. Cir. Ct. for Milwaukee Cnty.*, 176 Wis. 2d 101, 114, 499 N.W.2d 657 (1993); *State ex rel. Serocki v. Cir. Ct. for Clark Cnty.*, 163 Wis. 2d 152, 156, 471 N.W.2d 49 (1991) ("The legislative intent is that substitution be requested before the circuit court reaches a

[2] Mr. Matthews filed a petition for supervisory writ with his petition for leave to appeal the non-final order. The court denied the petition for supervisory writ and granted leave to appeal the non-final order. (10.)

substantive issue."); *State ex rel. Tarney v. McCormack*, 99 Wis. 2d 220, 234, 298 N.W.2d 552 (1980).

In this case, the circuit court extended the deadline for holding a probable cause hearing. This determination had no effect on the substantive issues in the case. The court could grant the request for an adjournment or deny it; neither outcome affected the merits of the case against Mr. Matthews. The court's determination was solely a procedural matter. Therefore, it was not a preliminary contested matter within the meaning of Wis. Stat. § 801.58(1), so Mr. Matthews' substitution request was timely.

A. The law on substitution.

"[A]ny party" may file a written request for substitution "not later than 60 days after service of the summons and complaint," and before "the hearing of any preliminary contested matters." Wis. Stat. § 801.58(1). The full text of the statute reads:

> Any party to a civil action or proceeding may file a written request, signed personally or by his or her attorney, with the clerk of courts for a substitution of a new judge for the judge assigned to the case. The written request shall be filed preceding the hearing of any preliminary contested matters and, if by the plaintiff, not later than 60 days after the summons and complaint are filed or, if by any other party, not later than 60 days after service of a summons and complaint upon that party. If a new judge is assigned to the trial of a case, a request for substitution must be made within 10 days of

> receipt of notice of assignment, provided that if the notice of assignment is received less than 10 days prior to trial, the request for substitution must be made within 24 hours of receipt of the notice and provided that if notification is received less than 24 hours prior to trial, the action shall proceed to trial only upon stipulation of the parties that the assigned judge may preside at the trial of the action. Upon filing the written request, the filing party shall forthwith mail a copy thereof to all parties to the action and to the named judge.

Wis. Stat. § 801.58(1). If a substitution request is timely filed, substitution must be granted, and the judge loses competency to proceed further. *City of La Crosse v. Jiracek Co., Inc.*, 108 Wis. 2d 684, 697, 324 N.W.2d 440 (Ct. App. 1982).

The right to substitution under section 801.58 applies in ch. 980 commitment proceedings. *State v. Brown*, 215 Wis. 2d 716, 719, 724, 573 N.W.2d 884 (Ct. App. 1997).

This means that Mr. Matthews only needed to file his substitution request (1) within 60 days of being served with the ch. 980 petition, and (2) before "the hearing of any preliminary contested matters." Wis. Stat. § 801.58(1).

The first of these criteria was indisputably satisfied. Mr. Matthews filed the request 28 days after he was served with the ch. 980 petition. (3; 4; App. 122.) Thus, the only issue on appeal is whether the adjournment was a "preliminary contested matter" within the meaning of Wis. Stat. § 801.58(1).

This is a question of statutory interpretation. Statutory interpretation is a question of law that this court reviews de novo. *State v. Stewart*, 2018 WI App 41, ¶ 18, 383 Wis. 2d 546, 916 N.W.2d 188. "The cardinal rule in all statutory interpretation, as this court has often said, is to discern the intent of the legislature." *Scott v. First State Ins. Co.*, 155 Wis.2d 608, 612, 456 N.W.2d 152 (1990).

B. The adjournment was not a preliminary contested matter.

The Wisconsin Supreme Court has already articulated the legislative intent behind this provision of the substitution statute. "The legislative intent is that substitution be requested before the circuit court reaches a substantive issue." *Serocki*, 163 Wis. 2d 152, 156–57. "The reason for the statutory requirement is that a litigant who does not like the way a judge is handling a matter should not be able to substitute a second judge simply because the litigant believes things are going badly before the first judge and hopes to obtain a more favorable tribunal." *Tarney*, 99 Wis. 2d 220, 234 (internal quotations omitted).

This plain statement of the statutory intent demonstrates that Mr. Matthews' substitution request was timely. Mr. Matthews requested substitution before the court considered any substantive issues in the case. The court had only ruled on his procedural request to adjourn the probable cause hearing. Extending this statutory deadline had no effect on the outcome of a trial

directed at determining whether Mr. Matthews should be committed under ch. 980. This court does not need to look any further than the previously-identified statutory intent to resolve this case.

Nevertheless, case law further supports Mr. Matthews. The rule barring substitution after the court has ruled on "preliminary contested matters" has its roots in *Pure Milk*. *Pure Milk Products Coop. v. Nat'l Farmers Org.*, 64 Wis. 2d 241, 219 N.W.2d 564 (1974). There, the court entered an *ex parte* temporary restraining order against the defendant when the complaint was filed. *Id.* at 244. Later, the court held a contested hearing to decide whether to keep the restraining order in place until it could hold a hearing on the plaintiff's request for an injunction. *Id.* at 244-45. After that hearing, the defendant requested substitution. *Id.* at 245.

At the time, the substitution statute did not include language barring substitution after the court ruled on "preliminary contested matters," and more broadly permitted substitution anytime within 10 days after the case was noticed for trial. Wis. Stat. § 261.08(1) (1973-74). Nevertheless, the court interpreted the statute to include this limitation. The court held that a litigant could not seek substitution after the court had weighed in on the substantive issues in the case:

> The right to a substitution of a judge . . . can also be waived by participation in preliminary motions in which the judge is allowed to receive evidence which of necessity is used and weighed

> in deciding ultimate issues as determined by the Arizona court in *Marsin v. Udall*."

Id. at 250. The court adopted the rule from *Marsin* as its own and quoted that case further:

> Evidence of collateral matters not bearing on the final decision cannot constitute a waiver of the right to challenge the fairness of a judge, but this court is committed to the rule that if a judge is allowed to receive evidence which of necessity is to be used and weighed in deciding the ultimate issues, it is too late to disqualify him on the ground of bias and prejudice.

Id. (quoting *Marsin v. Udall*, 279 P.2d 721, 725 (Ariz. 1955)).

This last quote makes plain that Mr. Matthews' request was timely. He requested substitution before the court received any "evidence which of necessity is to be used and weighed in deciding the ultimate issues." The court had not received any evidence at all; the court had merely ruled on a procedural motion to adjourn the probable cause hearing. This was a "collateral matter[] not bearing on the final decision," so it did not result in a waiver of his right to substitution.

After *Pure Milk*, the statute was amended to codify the rule it announced, and the "preliminary contested matters" language was added.[3]

---

[3] "The requirement in section 801.58(1) that a party may not request substitution after it has presented its views in (continued)

Importantly, *Pure Milk* limited this rule to *substantive* issues that could have some bearing on the trial. The defendant in *Pure Milk* was not entitled to substitution because it made its request after the court heard a contested hearing on a temporary restraining order. *Id.* at 245. By that point, the court had already taken evidence, and resolved issues that could bear on the plaintiff's request for a permanent injunction.

In contrast, here the court had not resolved any substantive contested matters in Mr. Matthews' case before he sought substitution. Instead, the court made *ex parte* findings, and Mr. Matthews appeared at the scheduled probable cause hearing, but neither of these steps change the fact that the only contested matter the court resolved was whether to extend the statutory deadline for holding a probable cause hearing. That decision had no effect on either party's case in the ch. 980 trial.

It is irrelevant that the court made an *ex parte* finding of probable cause before Mr. Matthews was served with the ch. 980 petition. The circuit court ruled that this *ex parte* finding was a preliminary contested matter.[4] This ruling is flatly contradicted

---

a preliminary contested matter is a codification of our decision in *Pure Milk Products Co-op. v. NFO*, 64 Wis. 2d 241, 219 N.W.2d 564 (1974)." *State ex rel. Carkel v. Cir. Ct. For Lincoln Cnty.*, 141 Wis. 2d 257, 265, 414 N.W.2d 640.

[4] The circuit court mistakenly called this an "*Arends* review." While an *Arends* review involves a similar *ex parte* finding, it occurs only in discharge proceedings, not an initial (continued)

by precedent; *ex parte* decisions do not affect a party's right to substitution. *Threlfall v. Town of Muscoda*, 152 Wis. 2d 308, 311, 448 N.W.2d 274, 275 (Ct. App. 1989). Mr. Matthews was not even served with the ch. 980 petition until after the *ex parte* review. (2; 3.) If the *ex parte* review were a preliminary contested matter, Mr. Matthews' "right of substitution would come into being and would be terminated before [he] was aware of the identity of the judge before whom the matter would be heard. Such an interpretation of sec. 801.58, Stats., would defeat the legislative purpose of allowing substitution of a judge and would be contrary to this court's practice of interpreting the statutory substitution provisions in a reasonable manner to give the litigant a reasonable period of time to request a substitution after he or she learns which judge is assigned to the case." *Tarney*, 99 Wis. 2d 220, 235.

No Wisconsin court has held that a ruling on a motion to adjourn is a preliminary contested matter. This strictly procedural matter does not implicate the concerns at the heart of the substitution statute. In *Sielen*, the Wisconsin Supreme Court held that a hearing on a motion to compel discovery was a preliminary contested matter because the hearing could have resolved matters that would have affected the presentation of the case at trial. 176 Wis. 2d 101, 114. The court pointed out that when deciding a motion to compel discovery, the circuit court could

---

commitment. *State v. Arends*, 2010 WI 46, 325 Wis. 2d 1, 784 N.W.2d 513.

"hold certain facts established" or "preclude the introduction of certain evidence," two outcomes that could have dramatically "implicated the merits of the case." *Id.* "In fact, in a motion to compel discovery, the judge could impose a sanction that precludes a party from submitting any evidence, a sanction which obviously implicates the merits of the case in that it likely disposes of the case." *Id.*

In contrast, the merits of the case were not implicated here, where the court was simply asked to decide whether there was cause to extend the deadline for a probable cause hearing. There was no possibility that the merits of the case would come into play. Although the hearing was scheduled to address probable cause, that issue was never actually considered. The only matter the court resolved was whether cause existed to delay the probable cause hearing. No consequence affecting the merits of the ch. 980 petition could flow from this proceeding.

The circuit court interpreted the phrase "preliminary contested matter" much too narrowly. In a strictly literal sense, the parties had "contested" whether to adjourn the probable cause hearing because the State objected (notably, however, the State did not have its witness present, so it conceded it would have been unable to proceed with the hearing had the court denied the requested adjournment (13:3-4; App. 106-07)). But ruling on the request for an adjournment had nothing to do with the substantive issues in the case (i.e. whether Mr. Matthews was a sexually violent person); it was strictly a procedural matter related to rescheduling a

court date. The court did not take evidence, rule on the admissibility of evidence, or take any action that would have any bearing on the substance of the ch. 980 trial.

The chief judge found the court "decided the substantive issue of whether Mr. Matthews could waive his statutory right to a timely hearing, and the outcome of the court's decision directly affected the presentation of Mr. Matthews' case within the meaning of Wis. Stat. § 801.58(1)." But this ruling is based on an inaccurate definition of a "substantive" issue. Extending the deadline for a probable cause hearing has nothing to do with the substance of the ch. 980 petition. Rather, this was solely a question of procedure.

The fact that the deadline could be extended on the State's motion, or on the court's own motion confirms that deciding to adjourn a hearing cannot be a preliminary contested matter. Wis. Stat. § 980.04(2)(b)2. It would completely defeat the purpose of the substitution statute if the State or the court could seek an adjournment, and thereby extinguish the parties' right to substitution.

Mr. Matthews requested substitution before the court resolved any preliminary contested matters in his case because the court had not decided any substantive issues in the case. The circuit court lost competency to do anything with the case after the substitution was timely filed. "A literal reading of sec. 801.58(2), Stats. 1979–80, requires the conclusion that the trial judge was not competent to proceed

with the case after substitution was requested, except for the limited purposes specified in connection with the request." *Jiracek*, 108 Wis. 2d 684, 697. Once Mr. Matthews requested substitution, the court was only empowered to take the steps necessary to effectuate the substitution, as outlined in Wis. Stat. § 801.58(2). Therefore, this court should reverse and remand for assignment of a new judge.

CONCLUSION

For the reasons argued above, Mr. Matthews asks that the court reverse the decision of the circuit court, and remand for assignment of a new judge.

Dated this 26th day of April, 2019.

Respectfully submitted,

DUSTIN C. HASKELL
Assistant State Public Defender
State Bar No. 1071804

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
haskelld@opd.wi.gov

Attorney for Respondent-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,505 words.

CERTIFICATE OF COMPLIANCE WITH RULE 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 § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 26th day of April, 2019

Signed:

_____

DUSTIN C. HASKELL
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 26th day of April, 2019.

Signed:

_____

DUSTIN C. HASKELL
Assistant State Public Defender

APPENDIX

INDE X
TO
APPENDIX

Page