STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2018AP2142

IN RE THE COMMITMENT OF TAVODESS MATTHEWS:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

TAVODESS MATTHEWS,

Respondent-Appellant.

APPEAL FROM A NON-FINAL ORDER DENYING JUDICIAL SUBSTITUTION, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE MICHELLE A. HAVAS AND MAXINE A. WHITE, PRESIDING

BRIEF OF PETITIONER RESPONDENT

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ISSUE PRESENTED

At a probable cause hearing concerning the State's petition to have Tavodess Matthews committed under Chapter 980, Matthews' attorney requested an adjournment because he was not prepared. Matthews then expressly waived his right to a timely probable cause hearing, and the court granted the adjournment.

Two weeks later, Matthews moved for a judicial substitution. The trial court denied Matthews' request, concluding that the prior probable cause hearing was "a contested matter" within the meaning of Wis. Stat. § 801.58(1), and therefore Matthews' request was untimely. Matthews sought review of the denial of his request for a judicial substitution by the chief judge. The chief judge agreed with the trial judge and denied Matthews' request.

Do the lower courts' decisions to deny Mattthews' request for a judicial substitution comply with Wis. Stat. § 801.58(1)?

Both lower courts held, Yes.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither. This Court can decide this case by applying the plain language of Wis. Stat. § 801.58(1) to the facts of the case.

STATEMENT OF THE CASE

On August 15, 2018, the circuit court scheduled a probable cause hearing regarding the State's petition to have Matthews committed under Chapter 980. (R. 13.) At the beginning of the hearing, however, Matthews' counsel informed the court that he was not "prepared to do an effective

cross." (R. 13:3.) He informed the court that Matthews did not object "to waiving the 10-day limit,"[1] and requested an adjournment. (R. 13:3.) The State objected, and it noted that "[t]he entire basis of this hearing and whether or not the Court finds probable cause is based on Mr. Matthews' certified criminal record, which all parties have, as well as the special purpose evaluation." (R. 13:4.) The State asked that the court schedule the hearing "as soon as possible." (R. 13:4.)

The court expressed its frustration and disappointment that the hearing was "unable to go forward." (R. 13:5.)

> [T]he Court did have time on [its] calendar this afternoon to accomplish this. Additionally, I was asked to help out another court this morning; and I did not. I turned that down because we had what would amount to at least an hour's worth of testimony, probably more once cross-examination is done. I was set to do that.
>
> It is rare that this Court has a couple of hours to dedicate to a case, and we did, and we were all set. And I didn't hear a word about this until [the State's attorney] reached out this morning right before noon to say that she had received a text from [defense counsel] that said, We're going to request an adjournment today. We're not ready to go.

(R. 13:5.) The court opined that this "is a waste of the [c]ourt's time. It's a waste of the parties' times. It's a waste of the family members' time." (R. 13:5.) The court understood that defense counsel was out of town, but that he should have "at least [had] the respect to say we're back and not ready to go today would have freed a lot of people up, including the witness who was ready to come down to be at this hearing."

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[1] Wisconsin Stat. § 980.04(2)(b) provides in relevant part that if a person is held in custody, a probable cause hearing "shall be held no later than 10 days after the person's scheduled release or discharge date . . . unless that time is extended by . . . the motion of any party."

(R. 13:6.) The court noted that it was uncertain "exactly when we're going to find time to" reschedule. (R. 13:6.) It asked Matthews if he was waiving the time limits, and Matthews responded, "[y]es." (R. 13:6.)

The court granted Matthews' request and adjourned. (R. 13:6.) At no time during this scheduled Chapter 980 probable cause hearing did Matthews' attorney seek a judicial substitution. Nor did he seek a substitution after the court adjourned the hearing.

Matthews did not request a hearing the next day, either. Matthews waited two weeks, on August 29, 2018, before he filed his request for a judicial substitution. (R. 4.) The court held a hearing on the same day. (R. 14.)

The court denied Matthews' request, concluding that it was not timely. (R. 14:2.) It recognized that Wis. Stat. § 801.58 applies to substitution requests in Chapter 980 cases, and that Matthews *does* have a right to make such a request. (R. 14:2–3.) It also recognized that at the August 15, 2018 probable cause hearing, the State was ready to proceed, but Matthews' counsel was not.[2] (R. 14:3.) The court found that the probable cause hearing was "a contested hearing" within the meaning of Wis. Stat. § 801.58(1). (R. 14:6.) And, at that contested hearing, Matthews' waived the time limits and obtained an adjournment. (R. 14:3.)

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[2] Matthews writes in his appellate brief that at the probable cause hearing, the State "conceded its only witness was not present" (Matthews' Br. 2), implying that the State was not prepared. S*ee also* Matthews' Br. 14, providing "the State did not have its witness present." But as the trial court recognized, "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 representation made by [Matthews'] counsel late that morning*." (R. 14:3 (emphasis added).)

The court concluded, "[t]hat is a substantive decision that I made; therefore, I don't believe that this is timely filed." (R. 14:3.) The court explained: "[J]ust as it is not for me to keep cases that are not assigned here, it's not fair for me to reject them and send them to my colleagues to be handled simply because someone does this." (R. 14:3.) The court continued, "We have the rules, and the timeliness of the rules needs to be followed. So I'm going to reject this request for substitution of judge for those reasons." (R. 14:3.)

The court then added that it had performed "an *Arends*[3] review when the petition was originally filed and signed finding and orders," which the court believed "is also a substantive issue that has been raised." (R. 14:7.)

Matthews sought review by the chief judge of the first judicial district. (R. 6.) At issue was whether his request for substitution was "filed preceding the hearing of any preliminary contested matters" within the meaning of Wis. Stat. § 801.58(1). (R. 7:1.) The chief judge noted that the phrase "preliminary contested matter" is not defined in the statutes. (R. 7:2.) But the chief judge discussed two cases that addressed Wis. Stat. § 801.58: *DeWitt Ross & Stevens, S.C. v. Galaxy Gaming and Racing Ltd. P'ship.,* 267 Wis. 2d 233, 670 N.W.2d 74, *overruled on other grounds,* 2004 WI 92, 273 Wis. 2d 577, 682 N.W.2d 839, and *State ex rel. Sielen v. Cir.*

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[3] *State v. Arends*, 2010 WI 46, 325 Wis. 2d 1, 784 N.W.2d 513. As Matthews correctly points out in his brief, the court's review was not actually an "*Arends* review," as such review occurs only in discharge proceedings. This case concerns a proceeding for initial commitment. (Matthews' Br. 12, n.4.) The court's review of Matthew's petition, which resulted in the court's scheduling a probable cause hearing, was done under Wis. Stat. § 980.04(2)(a). That statute provides that whenever a petition is filed, "the court shall hold a hearing to determine whether there is probable cause to believe that the person named in the petition is a sexually violent person."

Ct. for Milwaukee Cty., 176 Wis. 2d 101, 499 N.W.2d 657 (1993). (R. 7:2.)

The chief judge noted that in *Dewitt Ross*, 267 Wis. 2d 233, ¶¶ 36–38, this Court held that a hearing on a motion to compel discovery and for a protective order constituted a "preliminary contested matter" under Wis. Stat. § 801.58(1). (R. 7:2.) And in *Sielen,* 176 Wis. 2d at 113, the chief judge noted, the supreme court held that a hearing on a motion to compel discovery constituted a "preliminary contested matter" because "the outcome of the motion could have directly affected the presentation of the case." (R. 7:2.)

The chief judge concluded that in granting Matthews' request for an adjournment and receiving a waiver of his statutory right to a probable cause hearing, it "addressed and decided the substantive issue of whether [he] 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)." (R. 7:2.) The chief judge affirmed the trial court's denial of Matthews' request for judicial substitution. (R. 7:2–3.)

Matthews filed a petition for leave to review a non-final order or, alternatively, a supervisory writ. (*See* R. 10.) This Court denied Matthews's request for a supervisory writ, but it granted Matthews' petition for leave to appeal. (R. 10.)

STANDARD OF REVIEW

Whether a party is entitled to a substitution of judge under Wis. Stat. § 801.58 presents an issue of statutory interpretation, which this Court reviews *de novo*. *DeWitt Ross*, 267 Wis. 2d 233, ¶ 33.

ARGUMENT

Under Wis. Stat. § 801.58(1), a probable cause hearing is a "contested hearing." Matthews' substitution request—made two weeks *after* the probable cause hearing was adjourned—was untimely because it was not made, under the plain languge of the statute, preceding the contested matter.

A. The substitution of judges in civil cases is set forth is Wis. Stat. § 801.58(1).

Wisconsin Stat. § 801.58(1) sets forth the procedure for requesting substitution of a new circuit court judge in a civil action, including the time for filing the request. The statute provides in relevant part:

> Any party to a civil action or proceeding may file a written request . . . 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.*

Wis. Stat. § 801.58(1) (emphasis added).

Under Wis. Stat. § 801.58(2), "[i]f the judge named in the substitution request finds that the request was not timely and in proper form, that determination may be reviewed by the chief judge of the judicial administrative district."

B. Matthews does not dispute that a probable cause hearing is a "contested matter" under Wis. Stat. § 801.58(1).

Matthews failed to file his substitution request before the probable cause hearing. A probable cause hearing is a "contested matter" under Wis. Stat. § 801.58(1). At a probable cause hearing, the court has the power to determine whether there is probable cause to believe that the person named in the petition is sexually violent. Wis. Stat. § 980.04(2). It is a hearing for the parties to "contest" that ultimate issue. *See id*.

Thus, when Matthews filed his substitution request *after* the adjournment of his probable cause hearing, his request was untimely. *See* Wis. Stat. § 801.58(1).

Matthews does not dispute that a probable cause hearing is a "contested matter" under Wis. Stat. § 801.58(1). Rather, Matthews argues that by granting the adjournment during the probable cause hearing, that the circuit court did not "*rule"* on any contested matters. (Matthews' Br. 6–9.) He notes that the court "had not resolved any substantive contested matters" when he sought substitution, and that although the hearing was scheduled to address probable cause, that issue was never resolved. (Matthews' Br. 12, 14.) Therefore, Matthews' argument goes, his request for substitution two weeks after the adjournment of the probable cause hearing was timely under Wis. Stat. § 801.58(1). (Matthews' Br. 7.) Matthews is mistaken; the plain language of the statue provides otherwise.

C. The plain language of the statute does not provide that a party seeking substitution must make the request before a court *rules* on a "contested matter."

The plain language of Wis. Stat. § 801.58(1) provides that a "written request [for a judicial substitution] shall be filed preceding the hearing of any preliminary contested matters." Wis. Stat. § 801.58(1). The statute does not provide that a "written request [for a judicial substitution] shall be filed preceding the *ruling* on any preliminary contested matters." While that is what Matthews would like this statute to provide, it doesn't. It provides, unambiguously, that a party must make its request preceding "the hearing of any preliminary contested matters." Wis. Stat. § 801.58(1).

While Matthews requests that this Court consider the statute's legislative intent (Matthews' Br. 9), as opposed to the statute's plain language, "resort to legislative history is

not appropriate in the absence of a finding of ambiguity." *State v. Setagord,* 211 Wis. 2d 397, 406, 565 N.W.2d 506 (1997). And Matthews does not argue that the statute is ambiguous. Rather, the statute plainly states that a judicial request be filed before the hearing of any contested matters. Wis. Stat. § 801.58(1). In this case, it is uncontested that Matthews' request for judicial substitution was not filed preceding the hearing. It was therefore untimely under the statute.

Further, Matthews' legislate-intent argument shows that he is not entitled to judicial substitution. He relies on *State ex rel. v. Tarney v. McCormack*, 99 Wis. 2d 220, 234, 298 N.W.2d 552 (1980), which provides, "[t]he 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." (Matthews' Br. 9.) But that's what happened in this case. The trial court expressed its frustration at the way Matthews' case was proceeding, and Matthews requested judicial substitution two weeks later. As the transcript reveals, things were "going badly" for Matthews. *See Tarney*, 99 Wis. 2d at 234. The trial court expressed its frustration and disappointment at the probable cause hearing that the case was "unable to go forward." (R. 13:5.) The court stated:

- "I was asked to help out another court this morning; and I did not. I turned that down because we had what would amount to at least an hour's worth of testimony, probably more once cross-examination is done." (R. 13:5.)
- "I didn't hear a word about this until [the State's attorney] reached out this morning right before noon to say that she had received a text from [defense counsel] that

said, We're going to request an adjournment today. We're not ready to go." (R. 13:5.)

- This "is a waste of the [c]ourt's time. It's a waste of the parties' times. It's a waste of the family members' time." (R. 13:5.)
- Defense counsel should have "at least [had] the respect to say we're back and not ready to go today would have freed a lot of people up, including the witness who was ready to come down to be at this hearing." (R. 13:6.)

Therefore, under the legislative intent that Matthews relies on, he is not entitled to a judicial substitution because he requested it after things had started going badly for him. But again, because this Court need only consider the unambiguous language of the statue, Matthews' request was untimely filed under Wis. Stat § 801.58(1).

Case law is not contrary to this plain-language view of the statute. To be sure, case law holds that a hearing extinguishes the right to judicial substitution if evidence related the merits of the case is received at the hearing, and that the legislative intent is for a substitution request to be made before the circuit court reaches a substantive issue. *See, e.g.*, *State ex rel. Serocki v. Circuit Court for Clark Cty.*, 163 Wis. 2d 152, 156, 471 N.W.2d 49 (1991). But that holding does not mean that a party necessarily retains the right to judicial substitution before evidence is offered and before the court reaches a substantive issue. In other words, the receipt of evidence or a substantive decision is a sufficient condition, but not a necessary condition, for extinguishing the right to judicial substitution. As explained next, a hearing also extinguishes the right to judicial substitution if the circuit court "could have" ruled at the hearing in a way that implicated the merits of the case, even if no evidence was received at the hearing. *Sielen*, 176 Wis. 2d. at 113–14.

D. Case law supports the lower courts' decision that Matthews' request for substitution was untimely under Wis. Stat. § 801.58.

Matthews also argues that his request was timely because he requested substitution before any evidence was received at the probable cause hearing. (Matthews' Br. 11.) Matthews is incorrect.

In this case, the chief judge cited *Sielen* to support her decision that Matthews' request was untimely. (R. 7.) In that case, this Court denied a supervisory writ to compel officials of the circuit courts for Milwaukee County to honor Bernard and Cheryl Sielens' request for substitution of a judge in probate. *Sielen*, 176 Wis. 2d at 103. The Sielens argued that a hearing on a motion to compel discovery was not a preliminary contested matter "*because no evidence was received* at the hearing." *Id*. at 113 (emphasis added).

Conversely, Attorney Burton Strnad (who was retained on behalf of the estate) and the circuit court argued "that the fact that no one testified at the hearing is not dispositive. Rather, the dispositive question is whether the hearing concerned a substantive issue which went to the merits of the case." *Id*. Strnad and the circuit court contended "that although no one testified at the motion to compel, the outcome of the motion *could have* directly affected the presentation of the case and thus was a 'preliminary contested matter.'" *Id*. (emphasis added). This Court and the Wisconsin Supreme Court agreed with Strnad and the circuit court. *Id*. *See also id*. at 109 (The court noting, "subsection (1) . . . provides that a request for substitution must be filed before a hearing on a preliminary contested matter."). Therefore, "because the Sielens did not file their request for substitution until after the hearing on their motion to compel discovery, their request for substitution was untimely." *Id*. at 114.

Similarly, in this case, the probable cause hearing was a preliminary contested matter. The fact that "no one testified" or "no evidence was received" at the probable cause hearing "is not dispositive." *See Sielen*, 176 Wis. 2d at 113. Rather, the probable cause hearing was a "contested matter" that similarly *could have* affected the presentation of Matthews' case. "[T]he outcome of the motion [for adjournment of the probable cause hearing] could have directly affected the presentation of the case and thus was a 'preliminary contested matter.'" *See id.* Specifically, the circuit court could have denied Matthews' request for an adjournment and found probable cause, and "[t]he use of either of these powers could have implicated the merits of the case." *See id.* at 114. Compelling Matthews' attorney to participate in a hearing for which he was unprepared could have affected whether the circuit court would find probable cause. Matthews' request for judicial substitution was untimely because he did not file his motion until two weeks after the probable cause hearing was adjourned.

But Matthews relies on *Pure Milk Prod. Coop. v. Nat'l Farmer's Org.*, 64 Wis. 2d 241, 219 N.W.2d 564 (1974) to support his claim that because the court did not rule on any *substantive* issue or receive any evidence, that it was required to grant his request for substitution. (Matthews' Br. 10–12, 15.) Matthews is incorrect.

In *Pure Milk Products,* the defendants contended that their request for substitution of a judge was timely because the applicable statute allowed the request to be filed up to, and within, ten days after the case had been noticed for trial. 64 Wis. 2d at 246. That statute, Wis. Stat. § 261.08(1) (1971)[4], provided:

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[4] Wisconsin Stat. § 261.08 was replaced by Wis. Stat. § 801.58. *State ex rel. Tarney v. McCormack*, 99 Wis. 2d 220, 232, 298 N.W.2d 552.

> Any party to a civil action or proceeding may file a written request with the clerk of courts for a substitution of a new judge for the judge assigned to the trial of the case. The written request shall be filed . . . within [ten] days after the case is noticed for trial....

In *Pure Milk*, however, the case had never been noticed for trial. 64 Wis. 2d 246. The supreme court held that the defendants' request was nevertheless not timely because the parties had participated in a hearing on a temporary injunction request. *Id*. at 247. The court stated: "We conclude that the legislature could not have intended by the wording of sec. 261.08, Stats., to allow a change [of judge] after the hearing of a contested motion which implicates the merits of the action." *Id.* at 249.

In *Pure Milk*, as in this case, the request for substitution was made after the hearing. The Supreme Court determined the request was untimely. *Id*. at 249. This Court should do the same. While Matthews argues that *Pure Milk* "makes plain that Mr. Matthews's request was timely" because he sought substitution before the trial court received any evidence in deciding the ultimate issue (Matthews' Br. 11), Matthews is again ignoring the plain languge of the statute, which makes no exception for a hearing where no evidence is received. Matthews did not, as required by the unambiguous language of the statute, file his request "preceding the hearing of any preliminary contested matters." Wis. Stat. § 801.58(1). He filed it two weeks later. Under the plain language of Wis. Sat. § 801.58, Matthews is not entitled to a judicial substitution.

CONCLUSION

This Court should affirm the circuit court's order and chief judge's order denying Matthews' request for judicial substitution.

Dated this 7th day of June 2019.

Respectfully submitted,

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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 3,454 words.

Dated this 7th day of June 2019.

_____
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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 7th day of June 2019.

_____
SARA LYNN SHAEFFER
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