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.

REPLY BRIEF OF RESPONDENT-APPELLANT

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ARGUMENT

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

Mr. Matthews requested substitution before the court heard or decided any "preliminary contested matters," as that phrase is used in Wis. Stat. § 801.58(1). Consequently, his request was timely, and the court was required to grant substitution.

The State's primary argument hinges on an erroneous claim that *scheduling* a probable cause hearing is the same as *hearing* a probable cause hearing. (State's brief at 6-7, 11.) Mr. Matthews could only lose his right to substitution *after* "the hearing of any preliminary contested matters." Wis. Stat. § 801.58(1). The State asserts appearing at the scheduled probable cause hearing was enough, even though no party presented evidence, no party argued about probable cause, and the court made no findings relevant to probable cause. Although the probable cause hearing was scheduled, the court simply adjourned the hearing that neither party was prepared for.[1]

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[1] The State implies it bears no blame for not having its witness ready at the originally scheduled probable cause hearing. (State's Brief at 3 n.3). While telling the witness she did not need to come to the hearing was a courtesy to the witness' schedule, the State cannot complain about an

(continued)

The court did not hear (or decide) any preliminary contested matters in this case, and it was not enough to simply schedule a probable cause hearing. Mr. Matthews did not need to request substitution before appearing at a probable cause hearing that never actually addressed probable cause. He only needed to request substitution "before the circuit court reaches a substantive issue." *State ex rel. Serocki v. Cir. Ct. for Clark Cnty.*, 163 Wis. 2d 152, 156-57, 471 N.W.2d 49 (1991).

The State responds by noting a party can lose the right to substitution at a hearing where the court "'could have'" ruled in a way that implicated the merits of the case." (State's brief at 9.) Indeed, in *Sielen*, the court held that a hearing on a motion to compel discovery was a preliminary contested matter because the court "could have" resolved matters affecting the presentation of the case, like holding facts established, or precluding the introduction of evidence. *State ex rel. Sielen v. Cir. Ct. for Milwaukee Cnty.*, 176 Wis. 2d 101, 114, 499 N.W.2d 657 (1993). Therefore, a hearing on a motion to compel discovery—*which is actually heard and resolved*—is a preliminary contested matter.

But the State completely ignores the world of difference between a hearing on a motion to compel discovery that was argued and ruled on, and the probable cause hearing that was never heard in this case. The State stretches *Sielen* much too far by arguing that simply appearing at a hearing that was

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adjournment it effectively acceded to by showing up unprepared to proceed.

supposed to, but did not address a substantive issue actually relates to the substantive issue.

The State's argument asks this court to ignore the reality that the court never held a probable cause hearing. The State claims "the probable cause hearing was a preliminary contested hearing," while failing to note that no one said a word about probable cause at the hearing. (State's brief at 11.) The hearing was adjourned before anyone said or decided anything related to probable cause. The parties and the court only discussed the need for an adjournment. This is not a substantive matter going to the merits of the case. A probable cause hearing where the parties actually address probable cause may be a preliminary contested hearing. An adjourned probable cause hearing where the parties only discuss adjourning the hearing is not.

The State misreads caselaw to argue that Mr. Matthews is not entitled to substitution because things appeared to be going badly before the first judge. (State's brief at 8.) The State is correct that the "preliminary contested matters" provision is designed so a litigant cannot try to switch to a "more favorable tribunal" if things are going poorly before the first judge. *State ex rel. Tarney v. McCormack*, 99 Wis. 2d 220, 234, 298 N.W.2d 552 (1980). But the State reads that intent too broadly; the statute is only aimed at preventing substitution after "the circuit court reaches a *substantive* issue." *Serocki*, 163 Wis. 2d 152, 156-56. Mr. Matthews would be barred from seeking substitution if the substance of the ch. 980 case appeared to be going badly. But the substance of the ch. 980 petition was not going

poorly; the judge was simply displeased with counsels' failure to notify the court that they would need an adjournment.

The judge's displeasure with the adjournment has nothing to do with substitution. Under the State's reading, a civil litigant's right to substitution would be contingent on factors having nothing to do with the merits of the case. What if the judge had a particularly busy calendar, and welcomed the chance to take this hearing off the schedule? That judge may have been predisposed to granting the adjournment; things would not have been going poorly, and Mr. Matthews' right to substitution would have remained intact. The State argues Mr. Matthews only lost his right to substitution because the court granted the adjournment reluctantly. The law of substitution does not turn on the judge's disposition to grant or deny an adjournment. The law requires the court to reach a substantive matter, which did not occur here.

Finally, the State explains that a court can hear a preliminary contested matter even when no evidence is introduced. (State's brief at 10.) Mr. Matthews agrees, as he must. *Sielen*, 176 Wis. 2d at 113. But (at the risk of becoming repetitive) the court must still reach a substantive issue going to the merits of the case. *Id.*; *State ex rel. Carkel, Inc. v. Circuit Court For Lincoln Cty.*, 141 Wis. 2d 257, 265, 414 N.W.2d 640 (1987); *Pure Milk Prod. Co-op. v. Nat'l Farmers Org.*, 64 Wis. 2d 241, 250, 219 N.W.2d 564 (1974); *DeWitt Ross & Stevens, S.C. v. Galaxy Gaming & Racing Ltd. P'ship*, 2003 WI App 190, ¶ 37, 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 State reaches its desired outcome only by ignoring that command in the caselaw.

Mr. Matthews requested substitution before the court heard any preliminary contested matters. The only matter that had come before the court was a request to adjourn a hearing, which the court granted. This hearing was completely unrelated from the substance of the ch. 980 petition, and could have no impact on the presentation of the case at trial. Consequently, Mr. Matthews' request was timely, so this court should reverse and remand for assignment of a new judge.

CONCLUSION

For the reasons argued above and in his initial brief, Mr. Matthews asks that the court reverse and remand for assignment of a new judge.

Dated this 31st day of July, 2019.

Respectfully submitted,

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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 1,163 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 31st day of July, 2019.

Signed:

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Assistant State Public Defender