

FILED
10-22-2021
CLERK OF WISCONSIN
COURT OF APPEALS

**State of Wisconsin
Court of Appeals
District 1
Appeal No. 2021AP001445-CR**

State of Wisconsin,

Plaintiff-Respondent,

v.

Ayodeji J. Aderemi,

Defendant-Appellant.

**On appeal from a judgment of the Milwaukee County
Circuit Court, The Honorable Joseph Wall, presiding**

Defendant-Appellant's Brief and Appendix

Law Offices of Jeffrey W. Jensen
111 E. Wisconsin Avenue, Suite 1925
Milwaukee, WI 53202-4825

414-671-9484
jensen@milwaukeecriminaldefense.pro

Attorneys for the Appellant

Table of Authority

Cases

<i>Boston Old Colony Ins. Co. v. International Rectifier Corp.</i> , 91 Wis. 2d 813, 284 N.W.2d 93 (1979)	14
<i>Currier v. Wis. Dep't of Revenue</i> , 288 Wis. 2d 693, 709 N.W.2d 520 (Ct. App. 2005)	13
<i>Hoffman v. Rankin</i> , 256 Wis. 2d 678, 649 N.W.2d 350 (Ct. App. 2002)	13
<i>State v. Ferguson</i> , 166 Wis. 2d 317, 479 N.W.2d 241 (Ct. App. 1991)	11
<i>State v. Popke</i> , 317 Wis. 2d 118, 765 N.W.2d 569 (2009)	11
<i>State v. Sorenson</i> , 234 Wis. 2d 648, 611 N.W.2d 240 (2000)	13
<i>State v. Woehrer</i> , 83 Wis. 2d 696, 266 N.W.2d 366 (1978)	12

Statutes

§ 971.01(2), Stats.	12
-----------------------------	----

Table of Contents

<u>Statement on Oral Argument and Publication</u>	<u>3</u>
<u>Statement of the Issues</u>	<u>3</u>
<u>Summary of the Argument</u>	<u>4</u>
<u>Statement of the Case</u>	
<u>I. Procedural History</u>	<u>6</u>
<u>II. Factual Background</u>	<u>8</u>
<u>Argument</u>	
<u>The circuit court erred in denying Aderemi’s motion to dismiss. The date stamp indicates that the information was untimely filed, and the state presented no evidence that the information was filed on some other date</u>	<u>9</u>
<u>Conclusion</u>	<u>17</u>
<u>Certification as to Length and E-Filing</u>	

Statement on Oral Argument and Publication

The issue presented by this appeal is unique. An opinion of the court of appeals will establish the meaning of “filed” in the era of e-filing. Therefore, although oral argument is not necessary, the appellant recommends publication.

Statement of the Issues

The issue in this case offers the court of appeals the opportunity to define the legal meaning of “filed” in the age of e-filing. Aderemi waived his preliminary hearing, and the case was set for an arraignment several days later, on August 6, 2018. At the arraignment, Aderemi acknowledged receipt of a paper copy of the information, and he entered not guilty pleas. Months later, on January 7, 2019, Aderemi discovered that no information had actually been filed in the case until December 7, 2018, so he moved to dismiss. The court had the clerk “look into it”, and, according to the judge, the clerk determined that the state electronically tendered an information for e-filing on August 6, 2018; however, the document went into “the system” and the clerk never actually date-stamped it and placed it into the court file until December 7, 2018.

Thus, the issue is: Did the state present sufficient evidence to establish that the information was received by the

clerk-- that is to say, “filed” by the clerk-- on a date other than the date of the file-stamp?

Answered by the circuit court: The information was “filed” when the state tendered it for electronic filing.

Summary of the Argument

Aderemi discovered that the information in this case was not filed until December 7, 2018, way more than thirty days after the preliminary hearing. As such, by statute, Aderemi was *entitled* to have the case dismissed without prejudice. The circuit court, though, denied Aderemi’s motion to dismiss.

The circuit court conducted a hearing into the motion. The judge took no testimony, though, and received no evidence at the hearing. Rather, Judge Wall¹ had the clerk “look into” what happened. According to the judge, the clerk reported that the state initiated e-filing of the information on August 6, 2018, the document went into Judge Conen’s “system”, but Judge Conen’s clerk never file-stamped the document and placed it into the court file. Judge Wall’s clerk finally did so on December 7, 2018.

Based on this report from the clerk, Judge Wall found that the state had timely “filed” the information on August 6, 2018, and denied Aderemi’s motion to dismiss.

The court of appeals must reverse this order because:

¹ It is necessary to use the judge’s name in order to differentiate him from Judge Conen

- The date-stamp on a legal document is conclusive as to the date of filing unless there is “uncontroverted and undisputed” *evidence* presented that the document was in fact received by the clerk on some other date. Here, the state presented no evidence whatsoever at the motion hearing. As such, the court’s finding of fact is clearly erroneous because it was not based on evidence. The date-stamp on the document should have prevailed.
- Even if the state did initiate the e-filing process on August 6, 2018, it was not actually filed until December 7, 2018. This is because there are two components to “filing”: (1) the document is delivered to the court; and, (2) the tendered document is received by the clerk. Here, even if the judge was correct that the state initiated the e-filing process on August 6, 2018, there is no evidence that any clerk actually received the document until December 7, 2018

Statement of the Case

I. Procedural History

On July 24, 2018, the defendant-appellant, Ayodeji Aderemi (hereinafter “Aderemi”), was charged in a criminal complaint filed in Milwaukee County with (1) first degree sexual assault of a child, SW, with sexual intercourse; (2) first degree sexual assault of a child, SW, (sexual contact); (3) repeated sexual assault of a child, LW; and (4) repeated sexual assault of a child, CW. (R:1) The complaint alleged that, over a period spanning from 2010 to 2018, Aderemi engaged in various forms of sexual behavior with the children.

On August 1, 2018, Aderemi waived his preliminary hearing. (R:41-4)

The state requested a different arraignment date, so the matter was set for arraignment on August 6, 2018. (R:41-4) At the arraignment, the prosecutor stated that she had filed an information (R:17)² with all of the same charges (R:42-2) Defense counsel acknowledged receipt of a paper copy of the information, waived its reading, and entered not guilty pleas to each of the counts. (R:42-2) The CCAP text docket entry noted that an information had been filed that day. However, no

² As will become important in this appeal, the date stamp on the information is December 7, 2018.

information was actually filed that date.

The case was set for trial on January 7, 2019. Prior to the start of trial, though, Aderemi orally moved the court to dismiss the case because the information had not been timely filed. (R:45-2) He acknowledged that at the arraignment he received a paper copy of the information; however, the electronic record showed that no information had actually been filed until December 7, 2018, well after the statutory thirty day time limit³. (R:45-3)

The judge indicated that he had the clerk look into the matter, and, according to the judge, the clerk determined that the state did electronically tender the information for filing on August 6, 2018; however, the clerk did not file the document at that time.⁴ (R:45-4) Rather, the clerk eventually filed the information on December 7, 2018. (R:45-5) The information is date-stamped as filed on December 7, 2018. (R:17) Based on these “findings”, the court ruled that the information was filed on August 6, 2018, and denied Aderemi’s motion to dismiss.. (R:45-16)

After approximately two days of testimony, the case was submitted to the jury. The jury returned verdicts finding Aderemi not guilty of count one⁵, but guilty of the remaining

³ See § 971.01(2), Stats

⁴ When a document is tendered for e-filing it is held in a cue until a clerk moves the document from the cue and into the court file. At that point, the software date stamps the document.

⁵ Count one alleged first degree sexual assault of a child with intercourse. This count carries with it a minimum mandatory period of initial confinement of twenty-five years.

three counts. (R:24)

The court sentenced Aderemi to a total of nineteen years in prison, bifurcated as fourteen years of initial confinement, and five years of extended supervision. (R:35)

There were no postconviction motions. Rather, Aderemi filed a notice of appeal.

II. Factual Background

The evidence presented at trial was that Aderemi sexually molested his three step-daughters, CW, LW, and SW from about 2013 until 2018. Aderemi's wife, TA, and he have a four year-old son together. TA filed for divorce in 2018 following the disclosure of the sexual abuse.

Aderemi testified that he never touched any of his stepdaughters for the purpose of sexual gratification. (R:52-48)

Argument

- I. **The circuit court erred in denying Aderemi's motion to dismiss. The date stamp indicates that the information was untimely filed, and the state presented no evidence to establish that the information was filed on some other date.**

Aderemi discovered that the information in this case was not filed until December 7, 2018, way more than thirty days after the preliminary hearing. As such, by statute, Aderemi was *entitled* to have the case dismissed without prejudice. The circuit court, though, denied Aderemi's motion to dismiss.

The circuit court conducted a hearing into the motion. The judge took no testimony, though, and received no evidence at the hearing. Rather, Judge Wall⁶ had the clerk "look into" what happened. According to the judge, the clerk reported that the state initiated e-filing of the information on August 6, 2018, the document went into Judge Conen's "system", but Judge Conen's clerk never file-stamped the document and placed it into the court file. Judge Wall's clerk finally did so on December 7, 2018.

Based on this report from the clerk, Judge Wall found that the state had timely "filed" the information on August 6, 2018, and denied Aderemi's motion to dismiss.

⁶ It is necessary to use the judge's name in order to differentiate him from Judge Conen

The court of appeals must reverse this order because:

- The date-stamp on a legal document is conclusive as to the date of filing unless there is “uncontroverted and undisputed” *evidence* presented that the document was in fact received by the clerk on some other date. Here, the state presented no evidence whatsoever at the motion hearing. As such, the court’s finding of fact is clearly erroneous because it was not based on any evidence. The date on the date-stamp should have prevailed.
- Even if the state did tender the information for filing on August 6, 2018, it was not actually filed until December 7, 2018. This is because there are two components to “filing”: (1) the document is delivered to the court; and, (2) the tendered document is received by the clerk. Here, even if the judge was correct that the state initiated the e-filing process on August 6, 2018, there is no evidence that any clerk actually received the document until December 7, 2018

A. Standard of appellate review

The analysis of this issue depends both upon the circuit court’s “finding of fact” concerning the date on which the

electronic information was delivered to the court, and the date on which it was actually received by the clerk; and, also upon the legal determination of whether the mere tendering of the information on August 6, 2018, without any evidence that the clerk actually received the document, constitutes “filing” of the information with the court.

The appellate court reviews “[T]he circuit court's findings of fact under the ‘clearly erroneous standard.’ Therefore, ‘we are bound not to upset the trial court's findings of historical or evidentiary fact unless they are contrary to the great weight and clear preponderance of the evidence.’” *State v. Popke*, 2009 WI 37, P20, 317 Wis. 2d 118, 131, 765 N.W.2d 569, 576, 2009 Wisc. LEXIS 28, *13 Thus, the court of appeals must accept the circuit court’s finding that the information was tendered on August 6, 2018 unless it is against the great weight and the clear preponderance of the evidence.

The question of when a document is “filed” is a question of law. The appellate court reviews questions of law without regard to the conclusion of the circuit court. See, e.g., *State v. Ferguson*, 166 Wis. 2d 317, 320-21, 479 N.W.2d 241 (Ct. App. 1991)

B. The failure to timely file the information entitles the defendant to dismissal of the case without prejudice.

§ 971.01(2), Stats. provides:

The information shall be filed with the clerk within 30 days after the completion of the preliminary examination or waiver thereof except that the district attorney may move the court wherein the information is to be filed for an order extending the period for filing such information for cause. Notice of such motion shall be given the defendant. Failure to file the information within such time shall entitle the defendant to have the action dismissed without prejudice.

The law is well-settled that, “The lack of an information . . . is not a matter of form. Here the state failed to file an information as clearly required by the statutory mandate. The statute could not be more clear. It says, ‘Failure to file the information within such time shall *entitle* the defendant to have the action dismissed without prejudice.’” *State v. Woehrer*, 83 Wis. 2d 696, 699, 266 N.W.2d 366, 368, 1978 Wisc. LEXIS 1016, *4

Plainly, then, if the information in this case was not filed until December 7, 2018, Aderemi is *entitled* to have the case dismissed without prejudice.

C. When is a legal document filed?

Concerning the legal definition of “filing”, the supreme court has noted:

Our rules do not define what constitutes a "filing." Usually, a clerk stamps a [a legal document] "filed" on the date the paper comes into the clerk of circuit court's office, and the date stamped on the notice serves as the date of filing. [internal citation omitted]. Despite this common practice, the date stamped on the [legal document] does not speak conclusively to the date of filing. *Id.* at 824. Rather, this court has determined that a [legal document] is "filed as of the date that the [document] is actually received by the clerk [of the circuit court].".

State v. Sorenson (In re Sorenson), 234 Wis. 2d 648, 660, 611 N.W.2d 240, 245-246, 2000 Wisc. LEXIS 223, *13, 2000 WI 43

Wisconsin courts have distinguished filing from mailing in a variety of contexts. "To construe or define 'mailing' as 'filing' is to ignore the plain meaning of the word. Mailing merely initiates the process by which an article in the due course of the post will be delivered." [internal citation omitted] "We are not aware of any statute or court rule providing that when a paper is presented for filing by mail, the filing is complete upon mailing.

Hoffman v. Rankin, 256 Wis. 2d 678, 687-688, 649 N.W.2d 350, 354-355, 2002 Wisc. App. LEXIS 668, *10, 2002 WI App 189
Thus, there ere are two components to "filing." "[A] [legal document] is *filed* when it is physically delivered to *and received by the relevant authority*." (emphasis provided) *Currier v. Wis. Dep't of Revenue*, 2006 WI App 12, P17, 288 Wis. 2d 693, 704, 709 N.W.2d 520, 526, 2005 Wisc. App. LEXIS 1096, *13

Thus, the supreme court has concluded that, "[A] [legal document] may be considered as filed on the date it is *actually received by the clerk* when that date is different from the date stamped on the notice only where there is *undisputed and*

uncontroverted evidence . . . to establish that date.” (emphasis provided) *Boston Old Colony Ins. Co. v. International Rectifier Corp.*, 91 Wis. 2d 813, 824, 284 N.W.2d 93, 98, 1979 Wisc. LEXIS 2150, *17

D. The circuit court’s finding of fact that the information was tendered to the court on August 6, 2018 is clearly erroneous.

Although the court conducted a hearing into Aderemi’s motion to dismiss, no witnesses testified, and no evidence was received. Rather, the judge said:

According to my clerk, he looked into the matter, and the district attorney did, in fact, file it on August 6th of 2018. When I say file, I mean it loosely. It went into Judge Conen’s system. In other words, the clerks for each judge have an electronic system which things are filed and they get it first. From there, they then post it to the docket. In this case it was -- Again, I say filed and I mean it loosely, it was filed by ADA Torbenson and went into Judge Conen’s clerk’s electronic system without the clerk then posting it or formally filing it onto the docket. Now, I was looking at the docket here. Starting on August 6th, 2018 there was an arraignment.

(R:45-4)

To put it bluntly, the court’s findings of fact are clearly erroneous because they are against the great weight and clear preponderance of the evidence. This is true because there was *no evidence produced at the hearing.*

Having the clerk “look into” the circumstances and report

to the judge is not testimony nor is it evidence.

For this reason alone, the circuit court's order denying Aderemi's motion to dismiss must be reversed. But it is far from the only reason.

E. Even if the state initiated electronic filing of the information on August 6, 2018, the filing was not complete until the clerk actually received the document on December 7, 2018.

Even if it is true, as the judge found, that the state initiated the e-filing of the information on August 6, 2018, it is undisputed that the process was not completed until December 7, 2018 when the clerk date-stamped the document and placed it into the court file.

The cases are clear that filing is not complete when a paper document is mailed to the clerk; or, even, when the document is physically delivered to the court. Rather, the filing is complete only when the clerk actually *receives* the document.

Here, initiating the e-filing process is the digital equivalent of mailing a paper document to the clerk. The filing is not complete until the clerk receives it, date-stamps it, and places it into the court file.

Here, even though the state may have tendered the information for e-filing on August 6, 2018, it was not received by the clerk until December 7, 2018.

Even if initiating the e-filing procedure is deemed to be the equivalent of physically delivering the document to the court-- as opposed to mailing it-- it still is not filed until the clerk actually receives it. In other words, a paper document is not filed simply because the party brings it to the courtroom and leaves it laying somewhere in the hope that the clerk will find it. Rather, a necessary component of the filing process is that the clerk actually receives the document.

F. There is insufficient evidence to set aside the date-stamp and find that the information was filed on August 6, 2018.

Aderemi concedes that the date-stamp on the information is not absolutely conclusive on the question of when it was filed. Rather, as mentioned above, “[A] [legal document] may be considered as filed on the date it is *actually received by the clerk* when that date is different from the date stamped on the notice only where there is *undisputed and uncontroverted evidence*, as in this case, to establish that date.” (emphasis provided) *Boston Old Colony Ins. Co. supra*, 91 Wis. 2d at 824.

Here, though, as mentioned above, there was no evidence presented to establish that the information was actually received by the clerk on August 6, 2018, which is a date different from the date-stamp. There was no testimony by Judge Conen’s clerk, or even any statement attributable to

Judge Conen's clerk, concerning whether he or she ever received the tendered information, but, for some reason, did not place it in the court file. Rather, according to Judge Wall's clerk, the information "went into Judge Conen's clerk's electronic system (on August 6) without the clerk then posting it or formally filing it onto the docket." This is wholly insufficient to establish that Judge Conen's clerk ever actually *received* the document. If any inference may be drawn, it is that the clerk never received the document because it was never placed into the court file. That did not occur until December, when Judge Wall's clerk placed the information in the court file.

Plainly, then, there is no undisputed and uncontroverted evidence that Judge Conen's clerk actually received the information on August 6, 2019. Thus, there is no basis in the record to find that the information was filed on a date other than December 7, 2019, which is the date on the date-stamp.

Conclusion

For these reasons it is respectfully requested that the court of appeals reverse the circuit court's order denying Aderemi's motion to dismiss, and order that the case be dismissed without prejudice.

Dated at Milwaukee, Wisconsin, this 22nd day of October,
2021.

Law Offices of Jeffrey W. Jensen
Attorneys for Appellant
Electronically signed by:
Jeffrey W. Jensen
State Bar No. 01012529

111 E. Wisconsin Avenue
Suite 1925
Milwaukee, WI 53202-4825

414.671.9484
jensen@milwaukeecriminaldefense.pro

Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 3495 words.

Dated at Milwaukee, Wisconsin, this 22nd day of October, 2021.

Law Offices of Jeffrey W. Jensen
Attorneys for Appellant
Electronically signed by:
Jeffrey W. Jensen
State Bar No. 01012529

111 E. Wisconsin Avenue
Suite 1925
Milwaukee, WI 53202-4825

414.671.9484
jensen@milwaukeecriminaldefense.pro