State of Wisconsin
Supreme Court
Appeal No. 2021AP001445-CR

State of Wisconsin,

Plaintiff-Respondent-Respondent,

v.

Ayodeji J. Aderemi,

Defendant-Appellant-Petitioner.

Petition for Review of an Opinion of the Wisconsin Court of Appeals

Petitioner's Petition 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 Petitioner

Table of Contents

Petition

Now comes the above-named petitioner, by his attorney, Jeffrey W. Jensen, Sr., and pursuant to § 809.62, Stats., hereby petitions the Wisconsin Supreme Court to review this matter.

As grounds, the undersigned alleges and shows to the court that the issues presented for review offer the supreme court an opportunity to clarify and harmonize various statutes concerning how to analyze a motion to dismiss an untimely filed information in the era of e-filing. Further, the published opinion of the court of appeals is in conflict with the opinion of the supreme court in *State v. Woehrer*, 83 Wis. 2d 696, 266 N.W. 2d 366 (1978).

Statement of the Issues

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. The public-facing CCAP entry for August 6, 2018 contained an entry that an information had been filed. Months later, Aderemi discovered that no information had actually been e-filed in the case until December 7, 2018, so he moved to dismiss under § 971.01, Stats. 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 never went into "the system" and the clerk never actually date-stamped it and placed it into the court file until December 7, 2018[1].

Based on this "investigation" by the clerk, the circuit court found that the information was filed on August 6, 2018; and, therefore, it was not untimely. The court denied Aderemi's motion to dismiss.

The court of appeals affirmed. The court found that the circuit court's finding of fact concerning the date of filing was not clearly erroneous; and, further the court found that Aderemi was not prejudiced by the late filing.

Thus, the issues are:

I. What sort of hearing is required by § 801.18(16), Stats in order to allow the court to change the presumptive filing date stamped on an e-filed document? Does the hearing require the presentation of evidence, and the adversarial testing of the evidence; or may the court simply direct the clerk to conduct an investigation?

Answered by the court of appeals: § 801.18(16), Stats

[1] This "finding of fact" by the circuit court is at odds with how CCAP works. If time passes from the date a document is tendered to the e-filing system and the date the document is accepted by the clerk, the filing date is automatically stamped on the document as the date the document was tendered to the system. Thus, because the information in this case was file-stamped on August 7, 2018, that is the presumptive date of filing. In other words, the information could not have been properly tendered to the e-filing system on August 6, 2018, as found by the circuit court.

does not mandate any specific procedure to be followed at a hearing on a party's challenge to the presumptive date of filing stamped on an e-filed document. The hearing conducted by the judge in this case was sufficient to support the judge's "finding fact" that the information was actually filed on August 6, 2018, despite the fact that it was file-stamped December 7, 2018. In other words, the circuit court's finding of fact was not clearly erroneous.

II. Was the circuit judge's finding of fact that the information was filed on August 6, 2018 clearly erroneous? That is, was there sufficient evidence in the record to overcome the presumption that the information was received by the clerk--that is to say, "filed" by the clerk-- on a date other than December 7, 2018, which is the date automatically stamped on the information?

Answered by the court of appeals: No. The circuit court's finding of fact as to the date of filing is not clearly erroneous. The fact that the public-facing CCAP contained an entry that the information was filed on August 6, 2018, combined with the fact that Aderemi acknowledged receipt of a paper information on that date, was sufficient to support the circuit court's finding of fact that the information was filed on August 6, 2018, despite it being file-stamped December 7, 2018.

III. Does § 971.26, Stats, which prohibits the court from dismissing an information unless prejudice is shown, supersede the provision of § 971.01, Stats, which states, in mandatory terms, that if an information is not filed within thirty days of the bindover, the defendant is *entitled* to dismissal? Put another way, are there two different procedures for analyzing a motion to dismiss an information under § 971.01, Stats, one where no information was filed, in which case the defendant is "entitled" to dismissal, and need not show prejudice; and a second procedure where an information is filed late, in which case the defendant must establish prejudice?

Answered by the court of appeals: Yes. There is a second procedure used where the information is filed, but it is filed late. In that situation, before the case may be dismissed under § 971.01, Stats,, the defendant must establish that he was prejudiced by the late filing. Here, Aderemi failed to establish that he was prejudiced by the late filing of the information.

Statutes Presented

§ 801.18(16), Stats., reads:

(16) Technical failures.

(a) A user whose filing is made untimely as a result of a technical failure may seek appropriate relief from the court as follows:

1. If the failure is caused by the court electronic filing system, the court may make a finding of fact that the user attempted to file the document with the court in a timely manner by submitting it to the electronic filing system. The court may enter an order permitting the document to be deemed filed or served on the date and time the user first attempted to submit the document electronically or may grant other relief as appropriate.

2. If the failure is not caused by the court electronic filing system, the court may grant appropriate relief from non-jurisdictional deadlines upon satisfactory proof of the cause. Users are responsible for timely filing of electronic documents to the same extent as filing of paper documents.

(b) A motion for relief due to technical failure shall be made on the next day the office of the clerk of court is open. The document that the user attempted to file shall be filed separately and any fees due shall be paid at that time.

(c) This subsection shall be liberally applied to avoid prejudice to any person using the electronic filing system in good faith.

§ 971.01, Stats., reads: "The information shall be filed with the clerk within 30 days after the completion of the preliminary examination or waiver thereof . . . Failure to file the information within such time shall entitle the defendant to have the action dismissed without prejudice."

§ 971.26, Stats., reads: "Formal defects**.** No . . . information . . . shall be invalid, nor shall the trial, judgment or other proceedings be affected by reason of any defect or imperfection in matters of form which do not prejudice the defendant."

Statement of the Case

I. Procedural History

On July 24, 2018, the petitioner, 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 public-facing CCAP docket entry noted that an information had been filed that day. However, no information was actually filed that date.

The record showed that the information was filed on December 7, 2018.

The case was set for trial on January 7, 2019. Prior to the start of trial, 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 limit[3]. (R:45-3)

The judge indicated that he had the clerk look into the matter, and, according to the judge, the clerk asserted 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

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

[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.

date-stamped as filed on December 7, 2018.[5] (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 one[6], but guilty of the remaining 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.

On appeal, Aderemi argued that the circuit court erred in denying his motion to dismiss. The court of appeals, though, affirmed. According to the appellate court, the circuit court's finding that the information was actually filed on August 6, 2018, and not on December 7, 2018-- which was the filed stamp date on the document-- was not clearly erroneous; and, further, even if the information was filed late, it need not be dismissed because Aderemi was not prejudiced by the late filing.

[5] Given the way that the electronic filing system works, if the information was tendered on August 6, 2018, that is the date which would be stamped on the document even if the clerk wanted until December to "file" it.

[6] 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.

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)

Discussion

I. The supreme court should review this matter in order to clarify and harmonize the various statutes governing the e-filing of documents.

The court of appeals summarized its holdings as follows: "When we apply the law of e-filing to the facts of this case, we can draw two reasonable conclusions that refute Aderemi's arguments and do not require an evidentiary hearing, much less dismissal of his conviction. First, we conclude that the trial court's findings of fact were not clearly erroneous. Second, we conclude that Aderemi was not prejudiced by the delay in the acceptance of the Information in the e-filing system." [Ct. App. opinion pp. 12-13]

In its analysis, the court of appeals observed, “To resolve these issues, we must interpret several statutes: WIS STAT § 971.01(2), WIS. STAT. § 971.26 and the electronic filing statute, WIS. STAT. § 801.18. Statutory interpretation is a question of law we review independently. *State v. Hager*, 2018 WI 40, ¶18, 381 Wis. 2d 74, 911 N.W.2d 17. ‘[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.” [Ct. App. opinion p. 9; App-1]

As will be set forth in more detail below, the circuit court’s “findings of fact” are clearly erroneous because they are contrary to the way the e-filing system works, and they were not based upon any sort of adversarial presentation of evidence; and, secondly, the court of appeals “interpreted” the law in such a way as to render § 971.01, Stats substantially meaningless, and the appellate court’s holding is in conflict with the supreme court’s opinion in *State v. Woehrer,* 83 Wis. 2d 696, 266 N.W.2d 366 (1978).

Although the court of appeals must, at times, interpret the meaning of statutes in order to discharge its function as an error correcting court, it is primarily the responsibility of the supreme court to declare what is the meaning of the law.

> [A]s the state court of last resort, [the supreme court’s] responsibility is "to oversee and implement the statewide development of the law. [internal citation omitted] As we recognized in *Schumacher,* the "power to review an error, even

> one technically waived, is essential for this court to properly discharge its functions." Id. at 406. Therefore, we have a responsibility to declare what the correct law is

State v. Beamon, 2013 WI 47, P48, 347 Wis. 2d 559, 586, 830 N.W.2d 681, 695, 2013 Wisc. LEXIS 260, *33, 2013 WL 2319482

For this reason alone, the supreme court should grant review. The issue presented requires the court to explain to the lower courts the law that is applicable to e-filing.

A. What are the procedural contours that a trial court must follow in holding a hearing to determine whether to change the date of the file stamp?

As mentioned above, the first prong of the appellate court's analysis is that the circuit court's "finding of fact" concerning when the information was filed is not clearly erroneous. But the circuit court's "finding of fact" that the information was filed on August 6, 2018, rather than on the date of the file stamp, December 7, 2018, is not based upon the presentation of any evidence, much less was the evidence subjected to any sort of adversarial testing.

Rather, the court merely stated for the record that he directed the clerk to "look into" what had occurred, and then the judge repeated what the clerk told him. Of particular concern is the fact that what the clerk told the judge is contrary to the way the e-filing system works. That is, as the court of appeals

recognized, a document is considered "filed" on the date it was electronically submitted to the system, not on the date that the clerk eventually accepts it. [Ct. App. opinion p. 11] *See* § 801.18(4)(c), Stats.

Thus, the fact that in this case the information was file stamped on December 7, 2018 raises a strong presumption that it was electronically submitted for e-filing on December 7th, not on August 6th.

In affirming the circuit court's finding of fact as to the filing date, the court of appeals relied in part on the fact that the public-facing CCAP system contained a docket entry for August 6th to the effect that the "information [was] filed." This, of course, is not evidence that the information was filed where there is, in fact, no information in the electronic record. This is particularly true in the era of e-filing.

Under the old paper filing system, it certainly would be possible for a party to tender a paper document to the clerk, who then misplaces the document before stamping it as filed. In that case, a docket entry that the information was filed might be important in establishing the date on which the paper document was handed to the clerk.

Under the e-filing system, though, the date of submission is automatically recorded by the software; and, regardless of when the clerk pulls the document through to the system, the date of filing will automatically be stamped as the date of

submission. In other words, in this case, the information absolutely could not have been electronically submitted on August 6th because, if it had been, the software would have automatically recorded August 6th as the submission date.

For this additional reason, then, the supreme court should review this matter. An opinion by the supreme court will create guidelines corning the procedural contours of a hearing under § 801.18(16), Stats to revise the date of filing. Further, the circuit court's "finding of fact" in this case, that the information was filed on August 6th, *is clearly erroneous*, and must be corrected by the supreme court.

B. The opinion of the court of appeals is in conflict with the supreme court's holding in Woehrer*, and it renders statutory language practically meaningless.*

In its opinion, the court of appeals created a second procedure that the trial courts must follow in deciding a motion to dismiss a late-filed information under § 971.01, Stats. That is: (1) if the motion to dismiss is made before an information is filed, as was the case in *Woehrer,* the defendant is *entitled* to dismissal without any showing of prejudice; however, (2) if an information is filed, but it is filed more than thirty days after bindover, then the defendant is not "entitled" to dismissal;

rather, he must establish that the late-filing of the information caused him prejudice[7].

This second procedure, in effect, renders the word "entitled" as used in § 971.01, Stats meaningless. Under the holding of the court of appeals, where an information is filed, but it is filed more than thirty days after the bindover, the defendant is not "entitled" to dismissal. Rather, before the case can be dismissed, the defendant must establish that he was prejudiced. There is no language in § 971.01, Stats to suggest that the defendant is not entitled to dismissal where the state files the information, but files it late.

Further, the opinion of the court of appeals in this case is in direct conflict with the supreme court's holding in *Woehrer*. In *Woehrer*, the supreme court did not carve out an exception to § 971.01, Stats where the information is filed, but it is filed late. In *Woehrer,* the supreme court emphasized that, "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." [emphasis in original] *Woehrer*, 83 Wis. 2d at, 699. The plain meaning of "entitled" is "having a right to certain benefits or privileges."[8] Implicit in the meaning of "entitled", then, is that the defendant need not demonstrate

[7] This, of course, is practically impossible. Any prejudice created by the late-filing of an information can be remedied by an adjournment of the trial. So, in other words, the opinion of the court of appeals in this case renders meaningless the language in s. 971.01 that the defendant is "entitled" to dismissal.

[8] Merriam Webster online dictionary

that he suffered any prejudice by the late filing in order to have the charges dismissed without prejudice.

Thus, the opinion of the court of appeals, which purports to merely "interpret" the statute, actually changes the meaning of the "clear" words of the statute. Further, the court of appeals opinion claims that it is merely "distinguishing" *Woehrer* on the facts. But, as mentioned, there is no exception in *Woehrer* where the information is filed, but it is filed late. Rather, the supreme court observed that the statute could not be clearer.

Under the opinion of the court of appeals in this case, then, the case law and the meaning of the statute is now considerably less clear.

C. ***A final observation***

Aderemi offers one final observation which is painfully obvious. He was, no doubt, handed a paper copy of the information on August 6, 2018. Thus, there is no due process component to the issues on appeal. Rather, it is strictly a matter of statutory interpretation. He was informed of the charges. He prepared his defense. The case went to trial, and the jury found him guilty. Had the circuit court granted Aderemi's motion to dismiss, it would have been without prejudice, and he would have been recharged. Now, if the supreme court finds that the circuit court erred in denying

Aderemi's motion to dismiss, the conviction will have to be vacated and the charges will have to be dismissed. Then the state will very likely recharge him, and there will be another trial. What is the point?

First off, it is worth noting that this is exactly what happened in *Woehrer*.

Further, the point is that the published opinion of the court of appeals in this case creates confusion about how, in the era of e-filing, a trial court ought to address the situation where an information is e-filed more than thirty days after the bindover. If the law on this point had been clear, the trial judge would have known exactly how to handle the situation. The judge did the best he could under the circumstances.

To borrow a phrase used by every law professor in every law school throughout the country, *tough cases make bad law.* That certainly is true in this case. It is completely understandable that the court of appeals would endeavor to avoid having to impose the busy-work of vacating Aderemi's conviction and ordering the circuit court to dismiss the case without prejudice, only to have the charges reissued, and the case retried. However, in the process, the court of appeals has created bad law. The supreme court should review this matter.

Conclusion

For these reasons it is respectfully requested that the supreme court review this matter.

Dated at Milwaukee, Wisconsin, this _____ day of February, 2023.

Law Offices of Jeffrey W. Jensen
Attorneys for Petitioner

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 §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 3692 words.

This brief was prepared using *Google Docs* word processing software.The length of the brief was obtained by use of the Word Count function of the software

I hereby certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the petition.

Dated this _____ day of February, 2023.

_____

Jeffrey W. Jensen