STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2021AP1504-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN DEAN PLEUSS,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING WIS. STAT. § 968.20 MOTION FOR THE RETURN OF PROPERTY, ENTERED IN MONROE COUNTY CIRCUIT COURT, THE HONORABLE MARK L. GOODMAN, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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ISSUES PRESENTED

Wisconsin Stat. § 968.20 creates a simplified procedure intended to facilitate the return of seized property that is neither contraband nor needed as evidence. It requires a person who seeks the return of seized property to apply for its return within 120 days of the initial appearance.

John Dean Pleuss filed a section 968.20 motion for the return of a shotgun seized in a criminal investigation 127 days after the initial appearance, shortly after charges against him were dismissed. The circuit court denied Pleuss' motion, determining: (1) that the 120-day time limit is mandatory and, therefore, Pleuss' untimely application deprived it of subject matter jurisdiction; and (2) alternatively, that the shotgun constituted contraband because Pleuss used it to commit a crime.

1. Did Pleuss' failure to file his section 968.20 application outside the statutory deadline deprive the circuit court of its competency to exercise its subject matter jurisdiction over Pleuss' application for the return of property?

The circuit court answered: Yes, based on its determination that the 120-day time limit is mandatory.

This Court should determine that the circuit court had competency to decide Pleuss' section 968.20 motion because the 120-day time limit is directory, not mandatory. It should remand the case to determine if Pleuss' failure to act was the result of excusable neglect under Wis. Stat. § 801.15(2)(a).

2. Did the circuit court apply the correct legal standards when it relied on the criminal complaint to determine that the shotgun constituted contraband?

The circuit court answered: Yes.

Assuming the circuit court had competency, then this Court should determine that, even if the out-of-court statements in the complaint constituted admissible evidence under Wis. Stat. § 908.03(8), remand is appropriate because the circuit court applied the wrong legal standard when it decided that the shotgun was contraband.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Whether section 968.20(1)'s 120-day time limit for applying for the return of property is directory or mandatory presents a novel question. Therefore, publication may be appropriate if this Court answers that question.

STATEMENT OF THE CASE

On October 1, 2020, the State charged Pleuss with intentionally pointing a firearm at or towards a law enforcement officer and disorderly conduct. (R. 2:1.) According to the complaint, Monroe County Sheriff's Deputy Matt Hoskins was outside Pleuss' residence in response to a citizen complaint when Pleuss pulled up in a truck behind his squad. (R. 2:2.) Pleuss appeared angry and asked Hoskins why he was there. (R. 2:2.) As Hoskins spoke to Pleuss, Pleuss reached over to the passenger side of the truck, pulled out a 12-gauge shotgun, and brought the shotgun up, pointing the barrel toward Hoskins. (R. 2:2.) Hosking deflected the end of the barrel with his hand and told Pleuss not to point the gun at him. (R. 2:2.) Pleuss put the gun back inside the truck. (R. 2:2.)

According to the complaint, Pleuss refused Hoskins's request to see his driver's license and instead produced his conceal carry card. (R. 2:2–3.) Pleuss told Hoskins he had no time for him and got back into his truck. (R. 2:3.) When Hoskins warned Pleuss about his cracked windshield and

pointing a firearm, Pleuss denied pointing a firearm at him and then picked up the shotgun and pointed it out the driver's side door. (R. 2:3.) Hoskins again told Pleuss to stop and put the gun away. (R. 2:3.) Deputy Mike Wildes and other deputies returned later and arrested Pleuss as he left his residence. (R. 2:3.) Officer seized a handgun from his pants pocket and a shotgun that was on the passenger side of the truck. (R. 2:3.).

Based on the parties' agreement, which required Pleuss to apologize and complete a gun safety course, the State moved to dismiss Pleuss' case without prejudice. (R. 18:1, 21:1.) On March 26, 2021, the circuit court ordered Pleuss' case dismissed without prejudice. (R. 23:1.)

On April 15, 2021, Pleuss moved for the return of his handgun and shotgun under section 968.20. (R. 27:1.)

At a hearing on Pleuss' motion, the parties agreed that the police seized two guns from Pleuss. (R. 40:3.) When the State requested information on Pleuss' ownership, Pleuss was not under oath when he affirmatively answered his attorney's question that he owned the guns, and neither the court nor the State insisted that he make his statement under oath. (R. 40:3.) The State did not object to the return of Pleuss' handgun because it did not believe it could argue that the handgun was used in the commission of a crime. (R. 40:3–5.) However, the State objected to the shotgun's return. (R. 4:4.) Relying on *Jones v. State*, 226 Wis. 2d 565, 594 N.W.2d 738 (1999) and the complaint's allegations, the State argued that Pleuss used the shotgun in the commission of a crime when he pointed it at Deputy Hoskins and, therefore, Pleuss was not entitled to the shotgun's return because it constituted contraband. (R. 40:4–5.) The State argued that the criminal complaint constituted a sworn document and that its allegations were sufficient to demonstrate that the property was contraband. (R. 40:7.)

Pleuss argued, based on the complaint's dismissal, that the State did not prove the commission of a crime and therefore, under Wis. Stat. § 968.20(1m)(d), he was entitled to the shotgun's return. (R. 40:9–10.) In a supplemental letter brief, Pleuss argued that the State's reliance on the complaint to show that the gun was used in the commission of a crime was insufficient to establish Pleuss committed a crime with the shotgun. (R. 32:1–2.) Pleuss renewed his argument that section 968.20(1m)(d) required the shotgun's return based on his case's dismissal of his case. (R. 32:2–3.)

In a written order, the court denied Pleuss' motion for the shotgun's return. (R. 34:2.) First, the court determined that Pleuss did not file his section 968.20 motion within 120 days of the initial appearance, as section 968.20(1) required. (R. 34:2–3.) Alternatively, the court determined, based on the complaint's allegations, that the shotgun constituted contraband because Pleuss used it to commit a crime. (R. 34:3–4.) And because, section 968.20(1m)(b) prohibits the return of a dangerous weapon to a person who commits a crime with it, the court determined that Pleuss was not entitled to the shotgun's returned. (R. 34:4.)

Pleuss appeals.

STANDARD OF REVIEW

Whether Pleuss' untimely section 968.20 motion deprived the court of competency to decide his motion presents a legal question that this Court independently reviews. *City of Eau Claire v. Booth*, 2016 WI 65, ¶ 6, 370 Wis. 2d 595, 882 N.W.2d 738.

Whether section 968.20 required the court to return Pleuss' shotgun presents a question of statutory interpretation that this court reviews independently. *Jones*, 226 Wis. 2d at 573. "[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." *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. The court begins statutory interpretation with the language of a statute. *Kalal*, 271 Wis. 2d, ¶ 45. If the statute's meaning is plain, the court ordinarily stops the inquiry and gives the language its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning. *Id*.

The statute's context and related provisions are also important to the meaning of a statute. *Id*. ¶ 46. "Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id*. The "[s]tatutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." *Id*. "A statute's purpose or scope may be readily apparent from its plain language or its relationship to surrounding or closely-related statutes – that is, from its context or the structure of the statute as a coherent whole." *Id*. ¶ 49.

ARGUMENT

The circuit court denied Pleuss' section 968.20 application to return his shotgun on alternative grounds. First, it determined that it lacked competency to decided Pleuss' motion because he failed to file it within section 968.20(1)'s 120-day time limit. (R. 34:2–3.) Second, the court determined that even if the 120-day time limit was permissive, Pleuss was not entitled to the shotgun's return because it was contraband. (R. 34:3–4.)

This Court should determine that the circuit court had competency to decide Pleuss' section 968.20 motion because the 120-day time limit is directory, not mandatory. It should remand the case to determine if Pleuss' failure to act was the

result of excusable neglect under Wis. Stat. § 801.15(2)(a). Assuming the circuit court had competency, then this Court should determine that, even if the out-of-court statements in the complaint constituted admissible evidence under Wis. Stat. § 908.03(8), remand is appropriate because the circuit court applied the wrong legal standard when it decided that the shotgun was contraband.

I. This Court should determine that sec. 968.20(1)'s 120-day time limit is directory and remand the case to allow Pleuss to make an excusable neglect showing.

A. Section 968.20 guides the return of property that law enforcement seizes.

Wisconsin Stat. § 968.20 establishes procedures guiding the return of property seized by law enforcement. A proceeding under section 968.20 "is a proceeding in rem to determine true ownership of specific property." *City of Milwaukee v. Glass*, 2001 WI 61, ¶¶ 15–21, 243 Wis. 2d 636, 628 N.W.2d 343. As an *in rem* action, a motion for the return of property under section 968.20 is civil in nature and falls "under the civil procedures of Wis. stat. ch. 801." *Jones*, 226 Wis. 2d at 595.

Under sec. 968.20(1), a person seeking the return of property may apply to the circuit court for the return of seized property. Section 968.20(1) establishes a time frame to apply for the property's return: "If an initial appearance under s. 970.01 is scheduled, the application for the return of the property shall be filed within 120 days of the initial appearance."

Section 968.20(1g) creates procedures that guide a court's review of person's property return application. It specifies the purpose of the hearing: "to hear all claims to its true ownership." Wis. Stat. § 968.20(1g). This section also establishes time limits for the hearing and provides that the

person can support the motion "by affidavits or other submissions." Wis. Stat. § 968.20(1g). Section 968.20(1g) requires the court to order the property's return when certain conditions are met: "If the right to possession is proved to the court's satisfaction, it shall order the property, other than contraband or property covered under sub. (1m) or (1r) or s. 173.21(4) or 968.205, returned if the court" makes any one of three findings under section 968.20(1g)(a), (am), or (b). Relevant to Pleuss' case is the finding under section 968.20(1g)(b) that "all proceedings and investigations in which it might be required have been completed."

Contraband defined. Property is contraband under section 968.20 if it falls within the definition of contraband under Wis. Stat. § 968.13(1)(a). *Jones*, 226 Wis. 2d at 587. Section 968.13(1)(a) begins "Contraband, which includes without limitation because of enumeration . . ." and then lists several items of contraband. *Id*. As the supreme court explained, "[b]ecause the statute expressly covers items 'without limitation by enumeration,' contraband cannot reasonably be read as limited to the class, type or nature of the items listed in subsec. (a)." *Jones*, 226 Wis. 2d at 588. Therefore, contraband is not limited to items that are per se illegal to possess and includes "legal items which are put to an illegal use or acquired illicitly." *Id*. at 590–91. If the property is contraband, it need not be returned and may be destroyed. *Id*. at 591, 593.

The return of dangerous weapons. Section 968.20(1m) establishes additional requirements when the item to be returned is ammunition or "a dangerous weapon," which includes "any firearm, whether loaded or unloaded." Wis. Stat. §§ 939.22(10) and 968.20(1m)(a)2.

Wisconsin Stat. § 968.20(1m)(b) prohibits the return of a dangerous weapon to a person who used it to commit a crime: "If the seized property is a dangerous weapon or ammunition, the property shall not be returned to any person

who committed a crime involving the use of the dangerous weapon or the ammunition." Based on its textual and historical analysis of section 968.20(1m)(b), the supreme court has determined that the legislature intended the forfeiture of dangerous weapons, including firearms, used in the commission of a crime. *Return of Prop. in State v. Perez*, 2001 WI 79, ¶ 61, 244 Wis. 2d 582, 628 N.W.2d 820.

Section 968.20(1m)(c) allows for the return of a dangerous weapon to an owner who did not have knowledge of or consent to its use in a crime: "Subject to par. (d), seized property that is a dangerous weapon or ammunition may be returned to the rightful owner under this section if the owner had no prior knowledge of and gave no consent to the commission of the crime."

Through 2015 Wisconsin Act 141 (effective date February 6, 2016), the legislature created section 968.20(1m)(d), which sets forth additional procedures when the dangerous weapon is a firearm.[1] Relevant to Pleuss' appeal, the statute provides in relevant part:

> 1. If the seized property is a firearm, . . . and a person claiming the right to possession of the firearm has applied for its return under sub. (1), the court shall order a hearing under sub. (1) to occur within 20 business days after the person applies for the return. If, at the hearing, all conditions under sub. (1) have been met and the person is not prohibited from possessing a firearm under state or federal law as determined by using information provided under s. 165.63, the court shall . . . order the property returned if one of the following has occurred:
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> . . .

[1] 2015 Wisconsin Act 141 (effective date February 6, 2016) appears at: https://docs.legis.wisconsin.gov/2015/related/acts/141.pdf (last viewed March 11, 2022).

> b. All charges filed in connection with the seizure against the person have been dismissed.
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> . . .

Wis. Stat. § 968.20(1m)(d)1.

Thus, in contrast to other property, when a person seeks return of a firearm, section 968.20(1m)(d) requires the court to insure that the person is not otherwise prohibited from possessing the firearm under state or federal law. *See*, e.g., Wis. Stat. § 941.29(1m) (possession of a firearm by a felon and other prohibited persons). The legislative history confirms that section 968.20(1m)(d)'s plain meaning that this section is intended to facilitate a court's determination that person seeking a firearm's return is not otherwise prohibited from possessing it. *See* Wisconsin Legislative Council Act Memo: 2015 Wis. Act 141: Return of Seized Firearms (dated March 30, 2016);[2] *see also Kalal*, 271 Wis. 2d 633, ¶ 51 (legislative history may be consulted to confirm or verify a plain-meaning interpretation).

The burdens at a section 968.20 hearing. The person seeking the property's return bears the burden of establishing the right to possess the property. *Jones*, 226 Wis. 2d at 594–95. The State has the burden of proving that the property is not needed as evidence and constitutes contraband. *Id*. at 570, 595. Because the rules of civil procedure apply to a section 968.20 motion for the return of property, the parties' burden of proof is "by the greater weight of the credible evidence." *Id*. at 595.

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[2] Wisconsin Legislative Council Act Memo: 2017 Wis. Act 141: Return of Seized Firearms (dated March 30, 2016) appears at: https://docs.legis.wisconsin.gov/2015/related/lcactmemo/act141.pdf (last viewed March 11, 2022).

B. Pleuss' untimely section 968.20 motion did not deprive the circuit court of its competency to decide his motion.

Pleuss concedes that he applied for return of his property "some 127 days after the initial appearance," which was beyond the 120-day time limit contemplated under section 968.20(1). (Pleuss' Br. 12–13.) Pleuss disagrees with the circuit court's determination that his untimely motion deprived the court of its competency to exercise its subject matter jurisdiction. (Pleuss' Br. 17.)

1. A court loses its competency to act when statutory time limits are mandatory.

Under article VII, section 8 of the Wisconsin Constitution, circuit courts have original jurisdiction in "all matters civil and criminal." *Vill. of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 8, 273 Wis. 2d 76, 681 N.W.2d 190. Because the constitution confers subject matter jurisdiction on the circuit court, the legislature cannot curtail the circuit court's subject matter jurisdiction by statute. *Id*.

While the state constitution confers jurisdictional authority on the circuit court, its competency to proceed, i.e., "its ability to undertake a consideration of the specific case or issue before it," is a power conferred by the legislature. *State v. Minniecheske*, 223 Wis. 2d 493, 497–98, 590 N.W.2d 17 (Ct. App. 1998). Noncompliance with a statutory mandate cannot negate the circuit court's subject matter jurisdiction, but noncompliance may result in the circuit court's loss of its competency to adjudicate a case. *Mikrut*, 273 Wis. 2d 76, ¶ 9.

"A circuit court loses statutory competency when the court or a party fails to abide by a statutory mandate." *State v. Sanders*, 2018 WI 51, ¶ 22, 381 Wis. 2d 522, 912 N.W.2d 16. "A party's failure to comply with a statutory time limit deprives a court of competency to proceed only when the time

limit is mandatory." *State v. Olson*, 2019 WI App 61, ¶ 11, 389 Wis. 2d 257, 936 N.W.2d 178. "Thus, when the time limit is merely directory, a lack of compliance does not cause the court to lose competency to proceed." *Id.*

"Under general principles of statutory construction, the word 'shall' in a statute setting a time limit is ordinarily presumed to be mandatory." *Eby v. Kozarek*, 153 Wis. 2d 75, 79, 450 N.W.2d 249 (1990). But Wisconsin courts have occasionally "held that statutory time limits are merely directory despite the use of the word 'shall.'" *Id.* In determining whether the legislature intended a statutory provision to be mandatory or directory, courts consider several factors including: (1) the statute's objectives; (2) its history; (3) the consequences that would follow from alternative interpretations; and (4) whether a penalty is imposed for its violation. *State v. R.R.E.*, 162 Wis. 2d 698, 708, 470 N.W.2d 283.

2. On balance, the *R.R.E.* factors lean in favor of treating section 968.20(1)'s 120-day time limit as directory rather than mandatory.

Application of *R.R.E.*'s four-factor test supports the determination that section 968.20(1)'s 120-day time limit is directory, not mandatory. *See R.R.E.*, 162 Wis. at 708.

First, this Court considers section 968.20(1)'s objectives. *RRE*, 162 Wis. 2d at 708. Section 968.20(1) serves an "explicit purpose" of authorizing a court to determine "the true ownership" of seized property through an *in rem* action. *Glass*, 243 Wis. 2d 636, ¶¶ 15–21. Here, the 120-day time limit advances this interest by requiring property owners to promptly claim their property. That said, the State agrees with Pleuss that the 120-day time limit does not appear related to the interests that section 968.20 is intended to protect, including preventing the return of property that

remains needed as evidence or that may constitute contraband, because the underlying criminal case may remain unresolved well past the 120-day time limit. (Pleuss' Br. 14–15.)

Second, this Court considers section 968.20(1)'s history. *R.R.E.*, 162 Wis. 2d at 708. Section 968.20's history reflects that the legislature intended to establish a "simplified procedure" to facilitate the return of seized property that is neither contraband nor needed as evidence. *Jones*, 266 Wis. 2d at 577. Section 968.20(1) has been on the books for over 50 years. *See* Wis. Stat. § 968.20(1) (1969–70). But the legislature only recently incorporated the 120-day time limit into section 968.20(1), when it amended Wisconsin's asset forfeiture laws. *See* 2017 Wisconsin Act 211, § 30 (effective April 4, 2018).[3] An accompanying Legislative Council Memo explains the change: "For procedural timelines, if an initial appearance is scheduled after arrest, the Act requires a person to apply for return of seized property within 120 days of the initial appearance." *See* Wisconsin Legislative Council Act Memo: 2017 Wis. Act 11, Asset Forfeiture (dated April 16, 2018).[4] The memo does not explain why the initial appearance, not the seizure of property, triggers the 120-day time limit. Nor does it provide an explanation as to why there is no time limit when no initial appearance occurs, either because charges were not issued or because a person had not

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[3] 2017 Wis. Act. 211 appears here: https://docs.legis.wisconsin.gov/2017/related/acts/211.pdf (last viewed March 11, 2022).

[4] Wisconsin Legislative Council Act Memo: 2017 Wis. Act 11, Asset Forfeiture (dated April 16, 2018) appears here: https://docs.legis.wisconsin.gov/2017/related/lcactmemo/act211.pdf (last viewed March 11, 2022).

been arrested and returned on a warrant. This history does not provide strong support for treating the time limit as mandatory.

Third, this Court considers the consequences that flow from a determination that the time limit is mandatory or discretionary. *R.R.E.*, 162 Wis. 2d at 708. Treating the time limit as mandatory may result in a significant consequence by depriving a person whose property has been seized from its return. And these consequences extend beyond criminal defendants like Pleuss. Section 968.20 is a remedy that allows "any person," not just a defendant, to seek return of seized property. While Pleuss knew that his property was seized and when the 120-day time limit for applying for the return of the property, other persons may not. For example, a person who had property lost or stolen may not know that law enforcement has subsequently seized the property or that a defendant from whom property was seized made an initial appearance that would trigger section 968.20(1)'s time limit. Because section 120-day time limit is not narrowly tailored to defendants like Pleuss who knew when their property was seized and when the triggering event occurred, i.e., initial appearance, treating the 120-day time limit as mandatory could potentially deprive innocent owners of their property's return. This consequence weighs strongly in favor of treating the time limit as discretionary rather than mandatory.

By contrast, treating the time limit as directory will have a less significant impact on others, including courts, which must determine the property's ownership, or police agencies, which must hold the property. "[A] time limit may be construed as directory when allowing something to be done after the time prescribed would not result in an injury." *Karow v. Milwaukee Cty. Civ. Serv. Comm'n*, 82 Wis. 2d 565, 572–73, 263 N.W.2d 214 (1978). Further, treating the 120-day time limit as directory will not impose an additional burden on law enforcement to retain property longer. Section

968.20(4) already authorizes governmental units that employ law enforcement agencies to enact ordinances to facilitate the return of property to its rightful owners. Thus, law enforcement agencies that want to release property that is not contraband and not needed as evidence may do so at any time.

Fourth, section 968.20 does not provide an express penalty for a violation of the 120-day time limit. The State agrees with Pleuss that the absence of a penalty weighs in favor of treating the time limit as directory rather than mandatory. (Pleuss' Br. 13.) That said, the absence of a penalty does not foreclose a court from determining that a statutory time limit is mandatory. *See Olson*, 389 Wis. 2d 257, ¶ 29. As such, while the absence of a penalty weighs "in favor of construing the time limit as directory, it does not tip the scales to any great extent." *Id*.

On balance, the State agrees with Pleuss that the factors weigh in favor of treating the 120-day time limit as directory rather than mandatory. But even if the time limit is directory, Pleuss was not entitled to disregard it.

3. A court may enlarge a directory time limit on a showing of excusable neglect.

The classification of the 120-day time limit as directory simply confers competency on the court to decide a section 968.20 motion after the time has passed. But a conclusion that the time limit is directory does not resolve what consequence, if any, should flow from Pleuss' failure to comply with it.

No case has addressed the consequence of failing to comply with section 968.20's 120-day time limit. Because the rules of civil practice generally apply to criminal proceedings, *see* Wis. Stat. § 972.11(1), this Court may look to decisions, both civil and criminal, interpreting other directory time limits for guidance.

In determining that restitution proceeding time limits were directory, this Court cautioned, "directory does not mean that the provision is merely discretionary or permissive because the legislature had plainly 'intended that the time limit be followed.'" *State v. Ziegler*, 2005 WI App 69, ¶ 14, 280 Wis. 2d 860, 695 N.W.2d 895 (citation omitted). Thus, this Court's declaration that section 968.20's 120-day time limit is directory would not automatically excuse Pleuss from complying with it.

Interpreting a different statutory time limit, the supreme court explained, "Construing the word 'shall' as merely directory arguably allows the circuit court discretion to extend the 10-day time limit due to excusable neglect." *See Vill. of Elm Grove v. Brefka*, 2013 WI 54, ¶ 22 n.8, 348 Wis. 2d 282, 832 N.W.2d 121, *amended*, 2013 WI 86, 350 Wis. 2d 724, 838 N.W.2d 87. This is because Wis. Stats. § 801.15(2)(a) grants circuit courts the authority to enlarge the period for doing some required act. Where a motion for additional time "is made after the expiration of the specified time, it shall not be granted unless the court finds that the failure to act was the result of excusable neglect." Wis. Stat. § 801.15(2)(a).

Pleuss did not ask the court to excuse his untimely filing of his motion due to excusable neglect. (R. 27:1–2.) Neither the parties nor the court questioned the timeliness of Pleuss' section 968.20 motion at the hearing. (R. 40.) Rather, the circuit court appears to have first raised the issue of its competency to decide Pleuss' motion in its order. (R. 34:2–3.) Based on this record and the absence of prior case law determining whether the 120-day time limit is mandatory or directory, this Court should determine that the appropriate remedy here is to issue a remand order that allows Pleuss to demonstrate that his untimely application resulted from excusable neglect.

II. Pleuss was not entitled to the shotgun's return because it was contraband, but the case should be remanded because the court applied the wrong legal standard when it made this determination.

Pleuss agrees that the court could decline to return the shotgun if it constituted contraband because it was used to commit a crime. (Pleuss' Br. 18, citing *Jones*, 226 Wis. 2d at 570.) But he argues that the evidence was insufficient because the court should not have relied on the criminal complaint to determine that the shotgun constituted contraband. (Pleuss' Br. 18–19.) Contrary to Pleuss' argument, the circuit court could consider the complaint as evidence because it constituted admissible hearsay under the public records exception, section 908.03(8). But because the circuit court applied an incorrect legal standard, i.e., probable cause rather than the greater weight of the credible evidence, this Court should remand the case to the circuit court to apply the correct legal standard.

1. Pleuss bears the burden of showing that the evidence was insufficient.

Pleuss' challenge is one to the sufficiency of the evidence to sustain the court's decision denying his section 968.20 claim based on its determination that the shotgun constituted contraband. A section 968.20 motion is an *in rem* action that falls under the rules of civil procedure. *Jones*, 226 Wis. 2d at 595. Wisconsin Stat. § 805.14(1) establishes a sufficiency-of-the-evidence test applicable to civil proceedings. A court may grant a motion challenging the sufficiency of the evidence only if it "is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party." *Id.* When reviewing a challenge to the sufficiency of the evidence in a bench trial,

this Court will affirm the circuit court's factual findings if they are not clearly erroneous. *See* Wis. Stat. § 805.17(2); *see also Ozaukee Cnty. v. Flessas*, 140 Wis. 2d 122, 130–31, 409 N.W.2d 408 (Ct. App. 1987).

2. The deputies' statements in the complaint constituted admissible evidence under the public records exception.

The State had the burden of demonstrating that the shotgun constituted contraband because it was used in the commission of a crime by the greater weight of the credible evidence. *Jones*, 226 Wis. 2d at 596.[5] Here, the State offered the criminal complaint signed under oath by Deputy Mike Wildes, an officer who participated in the investigation and arrest of Pleuss and which the district attorney filed in Pleuss' related criminal case. (R. 2:1–3.) Pleuss filed his section 968.20 motion with his criminal case. (R. 27:1.)

"Generally, a court may take judicial notice of its own records and proceedings for all proper purposes. This is particularly true when the records are part of an interrelated or connected case, especially where the issues, subject matter, or parties are the same or largely the same." *Johnson v. Mielke*, 49 Wis. 2d 60, 75, 181 N.W.2d 503 (1970). As such, the court could take judicial notice of the criminal complaint against Pleuss, a document which the district attorney was authorized to file by law. *See* Wis. Stat. §§ 902.01(2) (judicial notice), 968.01(2) (complaint requirements), and 968.02(1) (issuance and filing requirements). Pleuss has not disputed that the complaint upon which the court relied was not what

[5] Because neither the prosecutor nor the court questioned Pleuss' ownership of the firearms (R. 40:2–3.), the State concedes for purposes of this appeal that Pleuss met his burden of demonstrating that he owned the seized shotgun. *Jones*, 226 Wis. 2d at 594–95.

it purported to be: the original document in the file. *See* Wis. Stat. §§ 909.01, 909.015(7), and 909.02(2) (authentication requirements).

While the complaint itself is based on hearsay, i.e., out-of-court statements from deputies involved with the investigation and arrest of Pleuss, Pleuss did not object to the statements in the complaint because they constituted hearsay, either at the hearing or in a letter later filed with the court. (R. 32:1–3; 40:2–18.) Pleuss had a duty to timely object by "stating the specific ground of objection, if the specific ground was not apparent from the context." Wis. Stat. § 901.03(1)(a). A party forfeits an evidentiary objection that is not timely made with specificity. *See State v. Mercado*, 2021 WI 2, ¶¶ 35–36, 395 Wis. 2d 296, 953 N.W.2d 337. Had Pleuss timely objected to the State's offer of the complaint, either on authentication or hearsay grounds, both the State and the court would have been on notice and provided both with an opportunity to address the objection. *See State v. Huebner*, 2000 WI 59, ¶¶ 11–12, 235 Wis. 2d 486, 611 N.W.2d 727. And had the State believed that such an objection had merit, the State could have called the deputies, or alternatively, argued why the out-of-court statements constituted admissible hearsay under the public records and reports exception.

Wisconsin Stat. § 908.03(8), sets forth three alternative means by which public records are admissible.

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law, or (c) in civil cases and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Before explaining why the complaint fits within this hearsay exception, the State explains why Hoskins' and Wildes' statements are statements of a public office or agency.

Wilde's complaint and Hoskin's report, which Wilde relied on to prepare his complaint, constituted a report or statement "in any form" of a public office. Wis. Stat. § 908.03(8). This is because Deputies Hoskins and Wildes are employees of a public office, i.e., the sheriff, and were authorized by law to "keep and preserve the peace," to "suppress all affrays," and to secure "any person for felony or breach of the peach." Wis. Stat. § 59.28(1); *see also* Wis. Stat. § 165.85(2)(c) ("law enforcement officer defined) and Wis. Stat. § 939.22 ("peace officer"). The deputies had the authority to arrest Pleuss and conduct the search that resulted in the shotgun's seizure incident to his lawful arrest. Wis. Stat. §§ 968.07(1)(d) and 968.10(4). When the deputies arrested Pleuss, they had a duty to bring him before a judge and file a complaint. Wis. Stat. § 970.01(1) and (2). The complaint against Pleuss satisfied section 970.01's requirements because it was "a written statement of the essential facts constituting the offense charged" and made on oath before a district attorney or a judge. Wis. Stat. § 968.01(2). Because a complaint may be based on information and belief, it could be based on Hoskins' report, which is also a public record. Wis. Stat. § 968.01(2). Finally, the complaint was issued when the district attorney filed it. Wis. Stat. § 968.02. Thus, the complaint constitutes a statement or a report of a public office.

Further, the complaint, which sets forth Hoskins' and Wildes' statements, constitute a public record because they fit within at least two of the three alternative criteria for admissibility under section 908.03(8). First, the complaint sets for the activities of the sheriff's office because it describes Hoskins' initial encounter with Pleuss following a citizen complaint and the Wildes' subsequent actions that resulted in

Pleuss' arrest and the shotgun's seizure. Wis. Stat. § 908,03(8)(a). (R. 2:2–3.)

Second, the complaint is a statement documenting matters that Deputies Hoskins and Wildes observed pursuant to their duties as law enforcement officers. Wis. Stat. § 908.03(8)(b). Consistent with his statutory duty to keep and preserve the peace, Hoskins responded to a utility worker's complaint about a man with a gun. (R. 2:2.) During Hoskins' encounter with Pleuss, Pleuss removed a shotgun from the seat of his truck and pointed the barrel in Hoskins' direction, which would constitute the crime of intentionally pointing a firearm at a law enforcement officer. Wis. Stat. § 941.20(1m)(b). (R. 2:2.) Hoskins documented the encounter in his report, which Wildes incorporated into his complaint. (R. 2:2.) Wildes' complaint also reflects that, consistent with his duty to arrest and seize evidence incident to an arrest, he and other deputies arrested Pleuss and seized his shotgun from the truck. (R. 2:3.)

Relying on *State v. Olson*, 75 Wis. 2d 575, 250 N.W.2d 12, 17 (1977) and Wis. JI—Criminal 145 (2000), Pleuss argues that a complaint is not evidence. (Pleuss' Br. 18.) When the supreme court said that a complaint's "essential function is informative, not adjudicative," it was merely describing how the complaint is used to advance a criminal proceeding and obtain an arrest warrant. *Olson*, 75 Wis. 2d at 583. Nothing in *Olson* suggests that a complaint or its contents could never constitute admissible evidence in a civil *in rem* proceeding. Wisconsin JI—Criminal 145 simply instructs the jury that it should not consider the complaint in determining guilt in a criminal trial. Nothing in the instruction or its annotations suggests that a complaint might not constitute evidence in

another proceeding, including at a section 968.20 hearing. Neither *Olson* nor the jury instruction help Pleuss.[6]

On this record, the deputies' statement in the complaint constituted admissible evidence in the record supporting the court's conclusion the shotgun constituted contraband because it was used in the commission of a crime. Therefore, the officers' statements, as reported in the complaint, were sufficient to satisfy the State's burden of proving that Pleuss used the shotgun to commit a crime by the greater weight of the credible evidence.

3. Remand is appropriate for the court to apply the correct legal standard.

Even though sufficient evidence may have supported the circuit court's contraband determination, it nonetheless applied the wrong legal standard. In determining that the shotgun constituted contraband, the court stated, "there is ample probable cause to believe that it was used in the commission of the crime." (R. 34:4.) The legal standard for assessing whether an item constitutes contraband is not probable cause, but "proof by the greater weight of the credible evidence." *Jones*, 226 Wis. 2d at 595. Thus, even if the court could properly consider the complaint as substantive evidence, the court applied an incorrect legal standard when it determined that the shotgun constituted contraband.

Here, the court erroneously applied a lower standard to its determination that the shotgun constituted contraband. Even if the deputies' statements as set forth in the complaint satisfied the higher standard, the State acknowledges that

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[6] If a complaint is never evidence as Pleuss suggests, then the State could never charge a person with falsely swearing to a complaint, and a defendant like Pleuss could never impeach a witness who testifies inconsistently with his or her sworn statements in a complaint.

the court might have reached a different conclusion had it applied the correct burden of proof. *See State v. Daniel*, 2014 WI App 46, ¶ 12, 354 Wis. 2d 51, 847 N.W.2d 855, *affirmed*, 2015 WI 44, ¶ 53, 362 Wis. 2d 74, 862 N.W.2d 867. And when this Court is unable to determine from the record whether an error is harmless, it "may remand for the circuit court to apply the proper legal standard to the facts of the case." *Id.*; *see also* Wis. Stat. § 805.18 (harmless error).

Therefore, on this record, this Court should remand the case to the circuit court to apply the correct legal standard.

CONCLUSION

This Court should remand the case to the circuit court with directions. First, if this Court determines the 120-day time limit is directory, the circuit court should decide whether Pleuss' noncompliance with the time limit is due to excusable neglect. Second, if the circuit court determines that Pleuss' noncompliance with the time limit was due to excusable neglect, it should decide whether the State proved that the shotgun constituted contraband under the correct legal standard.

Dated this 11th day of March 2022.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,050 words.

Dated this 11th day of March 2022.

Electronically signed by:

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 11th day of March 2022.

Electronically signed by:

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