STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
CASE NO. 2021AP1504-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN DEAN PLEUSS,

Defendant-Appellant.

ON APPEAL FROM THE ORDER, ENTERED IN THE CIRCUIT COURT FOR MONROE COUNTY, CASE NO. 20 CF 603, THE HONORABLE MARK L. GOODMAN, PRESIDING

DEFENDANT-APPELLANT'S REPLY BRIEF

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ARGUMENT

I. PLEUSS IS ENTITLED TO THE RETURN OF HIS SHOTGUN UNDER WIS. STAT. § 968.20.

1. The circuit court is competent to decide Pleuss' Wis. Stat. § 968.20 motion as the 120-day time limit for filing a request for return of seized property is not mandatory.

The State agrees the 120-day time limit for seeking the return of property under Wis. Stat. § 968.20(1) is directory and therefore the circuit court erred when it found it did not have competency to act.[1] (State's Brief, pp. 7-8, 11-12). As both parties provide a sound analysis for this conclusion, this Court should likewise make the same finding.

The State argues, nonetheless, that even if the 120-day time limit is directory, Pleuss is not automatically excused from complying with it, citing *State v. Ziegler*, 2005 WI App 69, ¶ 14, 280 Wis. 2d 860, 695 N.W.2d 895; *Village 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; and Wis. Stats. § 801.15(2)(a). The circuit court's competency is not enough. Pleuss must also demonstrate "excusable neglect" for failing to meet the 120-day time limit.

The State's argument that Pleuss is required to demonstrate "excusable neglect" is not supported by the cases it cites.

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[1] 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." (State's Brief, pp. 17-18).

Ziegler considered whether a 14-year delay in seeking restitution—well-outside the 60-day statutory deadline—was valid. *Ziegler* noted the holding in *State v. Perry*, 181 Wis.2d 43, 53, 510 N.W.2d 722 (Ct.App. 1993), which found the 60-day timeframe was directory. *Perry*, at 56-57. *Perry* allowed a court to order restitution outside the 60-day statutory time frame as long as: 1) valid reasons exist for the delay; and 2) the defendant has not been prejudiced by the delay. *Id.*; See also *State v. Johnson*, 2002 WI App 166, ¶¶8-14, 256 Wis.2d 871, 649 N.W.2d 284 (citing *Perry* for "valid reasons" rationale). *Ziegler* viewed *Perry*'s two-factor test as "akin to a balancing test." In each case, the court must "balance the length and reasons for the delay against the injury, harm or prejudice to the defendant…." *Ziegler*, at ¶18. No mention was made of Wis. Stat. § 801.15(2)(a).

Village of Elm Grove addressed whether the 10-day period a defendant has to challenge a refusal was mandatory or directory. Applying the test in *Karow v. Milwaukee Cty. Civ. Serv. Comm'n*, 82 Wis.2d 565, 571-573, 263 N.W.2d 214 (1978), the court determined the 10-day period was mandatory, and could not be extended under Wis. Stat. §§ 800.115, 806.07, or ***801.15(2)(a)***, due to excusable neglect. *Village of Elm Grove*, at ¶40.

In addition, neither of the cases Pleuss cites in his brief-in-chief make any reference to Wis. Stat. § 801.15(2)(a). In *Matlin v. City of Sheboygan*, 2001 WI App 179, ¶15, 247 Wis. 2d 270, 634 N.W.2d 115, the court found that a 20-day period for holding a hearing on a raze order once it was challenged by the homeowner was directory. Neither party had to show excusable neglect. Instead, the court noted "the

general rule of liberal construction for procedural statutes in order to permit a determination upon the merits of the controversy" and ordered the circuit court to "schedule the hearing at the earliest convenient time." *Matlin*, at ¶¶13, 15. In *In re Estate of Warnecke*, 2006 WI App 62, 292 Wis.2d 438, 713 N.W.2d 109, the court found that a 30-day period for enrolling land in the DNR's Managed Forest Lands after a change in ownership was directory. *Warnecke*, at ¶¶8, 13. The court permitted the land to be enrolled some 5 months after the change in ownership. *Warnecke*, at ¶8. Again, no mention was made of Wis. Stat. § 801.15(2)(a) or excusable neglect. There is even less reason to impose an "excusable neglect" requirement in this case.

First, it's unclear what purpose is served by a 120-day deadline that commences on the date of the initial appearance. (See e.g. State's Brief, p. 18). Both the State and Pleuss agree a criminal case will often remain unresolved well past the 120-day time limit.

Second, the State is not prejudiced. As the State notes, "treating the 120-day time limit as directory will not impose an additional burden on law enforcement to retain the property longer." (State's Brief, p. 19). Further, nothing prevents law enforcement from releasing the property earlier if it so desires. (*Id.*, at p. 20).

Third, Pleuss filed his application on day 127—7 days late. In the scheme of things, 7 days is not consequential.

Fourth, the circuit court has already addressed the merits. The court made a ruling on whether the property was contraband in the event it "mistakenly concluded" the 120-day time-period was mandatory. (34:3). Remanding the case to establish "excusable neglect" thus serves no practical purpose.

In sum, the State cites no case holding that a time frame found to be "directory" may only be exceeded when the beneficiary can show "excusable neglect." No such a rule has ever been imposed under similar circumstances and there is no reason to impose such a rule here. The court was competent to act and has already ruled on whether the seized shotgun was contraband. The Court should not remand for a determination of "excusable neglect."

2. The State failed to meet its burden of proving the shotgun was contraband.

The parties agree as follows: 1) the party seeking return under Wis. Stat. § 968.20(1m)(d)1 bears the initial burden of establishing an ownership interest in the firearm and the right to legal possession; 2) the State then has the burden of proving the property cannot be returned either because it is still needed as evidence in the case or is contraband. The burden of proof for both parties is "by the greater weight of the credible evidence." (State's Brief, p. 15)

The State agrees Pleuss met his burden of proving he owned the seized shotgun. (State's Brief, p. 23, n.5). While the State does not explicitly concede Pleuss has the right to possess a firearm, it has never disputed this fact. Presumably, the State would not have returned Pleuss' pistol if it did not agree he had a right to possess a firearm.[2] See also *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct.App.1979) (unrefuted arguments are deemed conceded).

[2] Deputy Hoskins also states in the complaint that Pleuss handed him a Conceal and Carry permit with Pleuss' name on it. (2:2).

The State also concedes the circuit court "erroneously applied a lower standard to its determination that the shotgun constituted contraband" when it applied a "probable cause" standard rather than "proof by the greater weight of the credible evidence." (R. 34:4.) (State's Brief, p. 27). The State concedes the error is not harmless because the circuit court could have reached a different conclusion had it applied a higher burden of proof. (State's Brief, pp. 27-28). The State seeks a remand so the circuit court can apply the correct burden of proof.

A remand is pointless, however, if there's no evidence in the record to which the correct legal standard may be applied. As the State offered no evidence, and no evidence was admitted, it failed to meet any evidentiary burden.[3]

On appeal, the State argues that the complaint's content, while hearsay, is "admissible evidence" because it satisfies the "public records exception" to the hearsay rule under Wis. Stat. § 908.03(8). (State's Brief, pp. 24-27). The circuit court could therefore consider the allegations of the complaint just as it would any other substantive evidence.

The State's argument should be rejected for several alternative reasons: First, a criminal complaint filed for the purpose of commencing a criminal action has no evidentiary value, other than

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[3] The State also argues this is a "sufficiency of the evidence" case and therefore *Pleuss* bears the burden of showing the evidence was insufficient. (State's Brief, p. 22). The State's argument should be rejected for two reasons. First, the circuit court's legal determination is essentially void because it applied a burden of proof lower than the one the State was required to meet. Second, the evidence was insufficient as a matter of law because the State did not submit any admissible evidence. Whether a party has met its burden of proof is a question of law which this Court reviews without deference to the circuit court. *Jones*, at 596.

perhaps proving the defendant was charged with a crime. Second, neither the complaint nor its contents were admitted under the rules of evidence. Third, the complaint is not admissible under the "public records" exception to the hearsay rule because it is an "adversarial" document. Fourth, even if the complaint itself is admissible as a "public records" exception to the hearsay rule, its contents are not. The contents are hearsay within hearsay. Each level of hearsay must meet a hearsay exception. The State does not address this point or even suggest what this second level hearsay exception would be. Each of these arguments will be addressed in turn.

First, the criminal complaint is a charging document filed under Wis. Stat. § 968.01 for the purpose of commencing a criminal prosecution. The complaint is "*not an exhibit or evidence*; it is only a charging document. Its essential function is informative—to set forth sufficient facts from which a reasonable person could conclude that a crime was probably committed and that the defendant probably committed it." (emphasis added) *State v. Gilles*, 173 Wis. 2d 101, 116–17, 496 N.W.2d 133, 139–40 (Ct. App. 1992). See also *State v. Olson*, 75 Wis. 2d 575, 583, 250 N.W.2d 12, 17 (1977) (complaint is merely the "first of many steps in a criminal prosecution. *Its essential function is informative, not adjudicative.*"). The complaint, moreover, was never intended as a format to document evidence. It need only allege "essential" facts which may be based on "information and belief." *Gilles, at 116-117.*

The State counters that nothing Pleuss cites suggests that a complaint "*or its contents* could never constitute admissible evidence in a civil in rem proceeding." (State's Brief, p. 26). The circuit court

"*could* take judicial notice of the criminal complaint" and "*could* consider the complaint as evidence" (State's Brief, pp. 22, 23). In this case, the complaint was properly considered by the court because it was "admissible" as a public record under Wis. Stat. § 908.03(8).

The *content* of a criminal complaint may indeed be admissible under an exception to the hearsay rule. At trial, however, the State made no such argument. Instead, the State claimed its evidentiary burden was met "by the filing of the Criminal Complaint…." (40:7). In other words, the allegations in the complaint were substantive evidence because the complaint was in the record and the allegations were in the complaint. At trial, the State clearly relied on what was, and remains, *a charging document* that was filed under Wis. Stat. § 968.01, not the rules of evidence. Presumably, the circuit court never made an evidentiary ruling because the allegations of the complaint were already "admitted" as a matter of law.

The State does not entirely abandon this rationale on appeal but now adds that the factual content of the petition was "admissible" as an exception to the hearsay rule. By making this argument, however, the State implicitly concedes that the mere filing of a complaint is not enough; the complaint must pass muster under the rules of evidence, and be admitted as evidence, before it has any evidentiary value.

Second, the complaint's "admissibility" as an exception to the hearsay rule was neither raised nor decided. Generally, the proponent of the evidence has the burden to show why it is admissible. *State v. Jenkins*, 168 Wis. 2d 175, 188, 483 N.W.2d 262, 266 (Ct. App. 1992). The petition may have been, in theory, admissible as an exception to the hearsay rule, but the State never sought its admission at the *in*

rem proceeding. The circuit court never considered or decided whether a hearsay exception was met. Nor did the circuit court take judicial notice. As the State never raised the issue, Pleuss had no reason or clear opportunity to object on hearsay grounds. Pleuss responded to the argument the State was making, not the argument it could have made but didn't.

Third, whether the complaint could have been admitted as a public record in the *in rem* proceeding is by no means certain, as the complaint is not an objective version of the facts but an accusatory document filed for the purpose of commencing an adversarial proceeding. For these reasons, the complaint is neither an accurate nor reliable source of evidence. Under the same rule in the federal courts (Rule 803(8)), documents prepared by law enforcement are admissible only when they are "non-adversarial records." See e.g. *United States v. Cerda-Ramirz*, 730 F. App'x 449, 453 (9th Cir. 2018). The allegations in the complaint are clearly adversarial and for this reason alone cannot be admitted for the truth of the matter asserted.

Fourth, even if the complaint itself were admissible as a public record under Wis. Stat. § 908.03(8), the factual content constitutes double and triple hearsay. The complaint was sworn by Mike Wildes and Sarah Skiles based on a paper review of the incident reports compiled by Deputy Matt Hoskins. Hoskins, in turn, documented his own observations, as well as the observations and statements he obtained from other officers and civilian witnesses. Like a police report or a 911 recording, even when the document itself may be admissible under Wis. Stat. § 908.03(8), the content of the document, offered for the truth of the matter asserted, is only admissible if the

requirements of Wis. Stat. § 908.05 are met: "[h]earsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule." *State v. Ballos*, 230 Wis.2d 495, ¶19, 602 N.W.2d 117 (Ct.App. 1999). A 911 recording, for example, may be admitted as an exhibit under the "business record" exception to the hearsay rule if it meets the requirements of Wis. Stat. § 908.03(6). *Ballos*, at ¶19. *The content* of the 911 recording is only admissible if it also meets an exception to the hearsay rule such as a present sense impression (Wis. Stat. § 908.03(1)) or an excited utterance (Wis. Stat. § 908.03(2)). *Ballos*, at ¶¶13, 14. Meeting an exception to the hearsay rule does not end the inquiry. The content of a 911 call or police report, even if admissible as an exception to the hearsay rule, is not admissible if it violates some other evidentiary prohibition. See e.g. *Shorter v. State*, 33 So. 3d 512, 517 (Miss. Ct. App. 2009) (911 call by lawyer repeating client statements violates attorney-client privilege and not admissible). The State does not suggest any possible exception to the hearsay rule which could apply to *the contents* of the complaint.

The State also argues Pleuss never made a hearsay objection and therefore any argument that the complaint or its contents failed to meet an exception to the hearsay rule was forfeited. Again, the State ignores the fact that it never offered the complaint as evidence but rather insisted that the facts were already "admitted" by virtue of being alleged in the complaint. Pleuss responded by arguing that a complaint, filed to commence the action, is not evidence. "A complaint is nothing more than a written, formal accusation against a defendant charging the commission of one or more acts. You are not to consider it

evidence in any way." (32:2, citing WIS-JI Criminal 145). The State did not meet its burden "in any way, shape or form." (40:9). As the complaint and its contents were never formally offered for admission under the rules of evidence, Pleuss had no reason to lodge a hearsay objection. Nor would it have mattered for any practical reason. The State contends that a hearsay objection would have put the State on notice, thus providing an opportunity to address the objection by calling the deputies to testify or explaining how the complaint met an exception to the hearsay rule. The State's motive to augment the record or address hearsay concerns would not have been any less, however, based on the objection Pleuss did make that the complaint was not evidence.

In sum, the State failed to meet any evidentiary burden as it failed to present any admissible evidence. A remand for the purpose of having the circuit court apply the correct burden of proof is moot when there is no evidence in the record to which the new burden of proof may be applied. Nor, alternatively, is the State entitled to a remand for a "do over" when it made a tactical decision to rely exclusively on the criminal complaint as substantive evidence rather than admitted evidence. See e.g. *State v. Milashoski*, 159 Wis. 2d 99, 108, 464 N.W.2d 21 (Ct. App. 1990), aff'd, 163 Wis. 2d 72, 471 N.W.2d 42 (1991) (State, as respondent, forfeited argument defendant did not have standing to challenge search when it agreed defendant had standing at trial); *State v. Nichelson*, 220 Wis. 2d 214, 230, 582 N.W.2d 460 (Ct. App. 1998) (State forfeited remand to augment the record when it made a tactical decision to not present evidence at postconviction hearing).

CONCLUSION

This Court should reverse the judgment and remand with instructions to order return of the seized shotgun to Pleuss.

Dated this 25th day of March, 2022.

Respectfully submitted,

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CERTIFICATION BY ATTORNEY

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 2,964 words.

Dated this 25th day of March, 2022.

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