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CLERK OF WISCONSIN
COURT OF APPEALS

No. 22AP1076

IN THE
Wisconsin Court of Appeals
DISTRICT IV

ARTILLIS MITCHELL,
Petitioner-Appellant,

v.

CHRIS S. BUESGEN AND KEVIN A. CARR,
Respondents-Respondents,

On Appeal from the Dane County Circuit Court,
The Honorable Susan M. Crawford, Presiding, Case No.
22CV1204

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Artillis Mitchell's petition for certiorari review of a prison disciplinary decision was timely. There is no dispute Mitchell mailed his petition and requested a certified copy of his trust account statement before his May 2, 2022, 45-day deadline to file. Accordingly, under *Steldt* and *Walker*, the 45-day deadline was tolled as of April 26, 2022, when Mitchell mailed his petition. (See Mitchell Br., pp. 16-18.)

Mitchell's 45-day deadline remained tolled on May 17, 2022, when the circuit court acted on Mitchell's petition. This is so due to an additional tolling rule: When a prisoner requests a filing-fee waiver on grounds of indigency, as Mitchell did here, the 45-day deadline is tolled during the time the circuit court takes to determine the prisoner's eligibility for a fee waiver. (*Id.*, p. 18.)

Respondents contend tolling does not apply because Mitchell did not submit before May 2, 2022: (1) documents showing proof of exhaustion of administrative remedies; and (2) a certified copy of his trust account statement. Respondents are incorrect that tolling does not apply.

First, there is no dispute Mitchell submitted certain documents related to exhaustion of administrative remedies before the May 2 deadline. He later mailed additional exhaustion documents upon being prompted to do so by the Clerk of Courts. Because Mitchell had, in fact, exhausted his administrative remedies, any omission of certain exhaustion documents from Mitchell's April 26 petition is inconsequential: The purpose of the statute requiring documents proving exhaustion of remedies is to establish a petitioner's claim is ripe for adjudication by the circuit court. That purpose was fulfilled here.

Second, Mitchell did not include with his petition a certified copy of his trust account statement because he did not *have* such a certified copy. So, on April 25—seven days before the May 2 deadline—he requested such a certified copy from Stanley Correctional Institute (“SCI”). Mitchell’s request invokes the *Walker* tolling rule. *State ex rel. Walker v. McCaughtry*, 2001 WI App 110, ¶16, 244 Wis. 2d 177, 629 N.W.2d 17 (stating the 45-day deadline is tolled “when the documents over which prisoners have control have been mailed, and all of the documents over which prisoners have no control have been requested”).

Even if Mitchell’s petition were untimely, the appropriate remedy is denial of Mitchell’s request for fee waiver, not dismissal. Respondents contend that when Wis. Stats. §§ 801.02(7)(c) and 893.735 are read in conjunction with each other, dismissal is permitted. Respondents assert that a court has authority to dismiss the case if the prisoner fails to file certain exhaustion documents, thereby rendering his petition untimely pursuant to § 893.735(2). But § 893.735(2) does not address a remedy for omission of exhaustion documents; in contrast, § 801.02(7)(c) expressly addresses a remedy for such omission. The greater specificity of § 801.02(7)(c) controls over the more general terms of § 893.735(2). *Mueller v. Edwards*, 2017 WI App 79, ¶11, 378 Wis. 2d 689, 904 N.W.2d 392 (where two statutes conflict, the more specific statute controls over the general statute). The remedy under § 801.02(7)(c) is denial of fee waiver.

Finally, Mitchell’s initial omission of certain exhaustion documents is harmless because it is undisputed he in fact exhausted his administrative remedies.

Accordingly, this Court should reverse and remand with instructions that Mitchell’s petition be deemed timely.

Alternatively, the remedy for any untimeliness is denial of Mitchell's request for fee waiver, not dismissal.

ARGUMENT

I. Mitchell timely submitted his petition.

A. Equitable tolling began on April 26, 2022 and remained in place until May 17, 2022.

Pursuant to the *Steldt* and *Walker* tolling rules, Mitchell's 45-day deadline was tolled on April 26, 2022. *Steldt v. McCaughtry*, 2000 WI App 176, ¶17, 238 Wis. 2d 393, 617 N.W.2d 201; *Walker*, 244 Wis. 2d 177, ¶16; (Mitchell Br., pp. 16-18). On April 26, 2022, Mitchell mailed all documents required for tolling under *Steldt* for fee-waiver requests, except for a certified copy of his trust account statement, which he had requested from SCI the day before, invoking the *Walker* tolling rule. *Id.*

Tolling of the 45-day deadline remained in place on May 17, 2022, the date the Clerk filed Mitchell's petition and the circuit court granted Mitchell's request for fee waiver. The tolling remained in place on May 17 because *Steldt* and *Walker* hold that, where a prisoner requests a filing-fee waiver on grounds of indigency—as Mitchell did here—the 45-day deadline is tolled during the time the circuit court takes to determine the prisoner's eligibility for fee waiver. *Steldt*, 238 Wis. 2d 393, ¶17; *Walker*, 244 Wis. 2d 177, ¶16; (Mitchell Br., p. 18).

Respondents contend the 45-day period for Mitchell's petition was not tolled on May 17, 2022, for two reasons: **(1)** Mitchell did not include with his petition on April 26 all documents showing proof of exhaustion of administrative remedies; and **(2)** Mitchell did not include with his petition a certified copy of his trust account statement. (Resp. Br., p. 14.) As shown below, both of Respondents' arguments are unavailing.

Proof of Exhaustion. First, Mitchell acknowledges that he did not include with his April 26 petition all exhaustion documents referenced in Wis. Stat. § 801.02(7)(c). However, such initial omission is inconsequential because the documents Mitchell included with his petition proved he exhausted his administrative remedies.

Section 801.02(7)(c) requires the following exhaustion documents: “copies of all the written materials [petitioner] provided to the administrative agency as part of the administrative proceeding and all of the written materials the administrative agency provided to [petitioner] related to that administrative proceeding,” as well as “all written materials included as part of any administrative appeal.”

With his initial mailing on April 26, 2022, Mitchell included a copy of the reviewing authority’s decision and the DOC secretary’s decision. (R.11, p. 1 of 5, Appx.042.) These documents established that Mitchell had exhausted his administrative remedies. (*Id.*, p. 10 of 29; Appx.014); *see also Walker*, 244 Wis. 2d 177, ¶3 (noting that the issuance of the secretary’s final decision amounts to exhaustion of “appeals within the corrections system.”).

The purpose of the statute requiring documents establishing exhaustion of administrative remedies is to ensure a petition for certiorari is ripe for circuit court review. The documents Mitchell included with his petition satisfied the purpose of the statute because they established that he in fact had exhausted his administrative remedies. Indeed, Respondents do not dispute Mitchell in fact exhausted his administrative remedies. And, to the extent Mitchell omitted certain exhaustion documents with his April 26 petition, he remedied such oversight immediately upon being prompted by the Clerk’s office. (R.8, R.9.) Mitchell ultimately did provide complete evidence of exhaustion in response to the Prisoner Litigation Staff Attorney’s (the “PLSA”) request. (R.11, p. 1 of 5; Appx.042; R.11, p. 4 of 5, Appx.045; R.22, p. 2 of 14; Appx.058; R.9; Appx.037-41.)

Accordingly, Mitchell's omission of certain documents initially on April 26 is inconsequential and should not deprive him of the tolling rules. A failure to include complete evidence of exhaustion does not mandate rejection of a prisoner's petition, it simply *can* lead to rejection. *State ex rel. Locklear v. Schwarz*, 2001 WI App 74, ¶22, 242 Wis. 2d 327, 629 N.W.2d 30 ("The absence of any one of these requirements can lead to the court's rejection of the petition.").

Respondents assert that, under *Tyler*, a prisoner cannot avail himself of tolling unless all exhaustion documents required by statute are include and, thus, Mitchell is not entitled to tolling. (Resp. Br., pp. 15-17 (citing *State ex rel. Tyler v. Bett*, 2002 WI App 234, 257 Wis. 2d 606, 652 N.W.2d 800).) However, *Tyler* is distinguishable.

Tyler sought review of an unfavorable disciplinary decision issued against him by the Department of Corrections. His 45-day window to appeal that decision ran on July 2, 2001. On June 29, 2001, upon receiving Tyler's petition, a staff attorney for the Clerk of Circuit Court reviewed Tyler's petition and found it deficient for two reasons: (1) Tyler included only a partial payment of the filing fee; and (2) Tyler failed to include "all documents provided by the administrative agency to" him. *Id.*, ¶5 (cleaned up).

Tyler did not receive the letter explaining this until July 5, 2001—three days after his filing deadline. *Id.* Even so, Tyler attempted to comply with the PLSA's directions, and, on July 18, 2001, he "resubmitted" this petition. *Id.*, ¶6. The circuit court then found that the petition "was filed beyond the statutory forty-five-day deadline and it dismissed Tyler's action for failure to state a claim under Wis. Stat. § 802.05(3)(b)(4)." *Id.*, ¶7. Tyler appealed.

This Court explained the mailbox rule, and tolling requirements, and found that Tyler, with "his first submission," had "forwarded an inadequate filing fee and he

did not enclose the necessary documents required” by statute. *Id.*, ¶15. Further, Tyler was “*not* entitled to” tolling, “because, even though the items he submitted were ‘out of his control’ . . . they did not constitute a complete and proper submission.” *Id.* (emphasis in original).

The Court emphasized Tyler’s “carelessness” with the “insufficient [filing] fee.” *Id.*, ¶16. The Court declined to “reward his carelessness by giving him extra time to remedy matters that *were* within his control,” like the filing fee. *Id.* (emphasis in original). The Court sought to avoid incentivizing intentional submissions of “insufficient materials in order to gain additional time to submit proper petitions, thereby circumventing the forty-five-day deadline.” *Id.*

Here, Mitchell, unlike Tyler, did not submit a partial fee with his petition. Instead, Mitchell sought a waiver of the filing fee. That request for waiver triggered equitable tolling, which remained in place until May 17, 2022, when the circuit court reviewed and granted the request. So, Mitchell has not demonstrated any “carelessness” like that in *Tyler*.

Certified Copy of Trust Account Statement. Second, Respondents contend Mitchell was not entitled to tolling because he did not include with his petition a certified copy of his trust account statement. (Resp. Br., pp. 14, 17-19.) But, as Respondents acknowledge, at the time Mitchell mailed his petition on April 26, 2022, he did not ***have*** such a certified copy. (R.8:3, R. 11:3.) Consequently, the previous day—April 25, 2022—Mitchell requested a certified copy from SCI. (*Id.*)

However, Respondents assert Mitchell still should not be entitled to tolling because he did not request a certified copy of his trust account statement sufficiently in advance of his May 2, 2022, 45-day deadline. (Resp. Br., p. 18.)

Respondents fail to cite any statute or case law that requires petitioners, like Mitchell, to request documents outside their control by a date certain in advance of the 45-day filing deadline. Indeed, the standard Respondents seek to impose is unworkable. At what point before the 45-day deadline would Respondents be satisfied that a petitioner, like Mitchell, had requested the required documents? Respondents do not say—and neither does any statute or case. To use a nebulous concept such as “just days” or “last minute” to punish Mitchell when he otherwise complied with the statute and his 45-day deadline contravenes the law’s purpose of protecting *pro se* prisoner litigants against arbitrary outcomes and obligations they ultimately cannot control. *See Steldt*, 238 Wis. 2d 393, ¶16 (finding it unreasonable for clerks to exercise any discretion they might have “in a manner that denies prisoners their ability to bring certiorari actions”); *see also Walker*, 244 Wis. 2d 177, ¶17.

In sum, Mitchell’s 45-day deadline was tolled on April 26, 2022, when he mailed his petition—and by then had requested a certified copy of his trust account statement, which he did not possess—and tolling remained in effect on May 17, 2022, when the Clerk filed his petition and the circuit court acted on his request for fee waiver. Accordingly, his petition was timely, and this Court should reverse.

B. The Circuit Court—not the Clerk of Court or PLSA—is charged with the responsibility of determining whether all required documents have been filed with a petition for certiorari review.

Even if tolling somehow does not apply, Mitchell’s petition still was timely because he mailed it six days before the 45-day deadline. The Clerk of Court (or PLSA) impermissibly determined that Mitchell had omitted certain required documents and, consequently, held Mitchell’s petition instead of filing it upon receipt.

Respondents assert that the Clerk did not have authority **to file** Mitchell's petition. (Resp. Br., pp. 20-22.) Respondents assert that the court reviews the petition and accompanying documents and determines whether the petitioner is entitled to a fee waiver. (*Id.*, p. 20.) Respondents then assert that "[i]f the court grants the fee waiver, *then* the clerk files the case." (*Id.*, p. 21 (emphasis in original).) Although Respondents are correct to the extent they suggest the Clerk may refuse to accept papers for filing, the statutes do not grant the clerk authority to refuse to accept any paper for filing **on the basis that not all papers have been received**, as the Clerk did here. Indeed, *Steldt* instructs that "it is unreasonable for [a clerk to exercise discretion to refuse to file any paper without payment of the appropriate fees] in a manner that denies prisoners their ability to bring certiorari actions." 238 Wis. 2d 393, ¶16.

Respondents even make Mitchell's point for him when they quote *Adell* as follows: "[T]he **court** does not evaluate the substantive merits of the prisoner's claim **but only examines the submissions to determine if the prisoner has submitted all required documentation.**" (Resp. Br., p. 20 (quoting *State ex rel. Adell v. Smith*, 2001 WI App 168, ¶4 n.3, 247 Wis. 2d 260, 633 N.W.2d 231 (emphasis added)).) This is precisely Mitchell's point: The court examines the petition to ensure all documentation has been filed, not the Clerk or the PLSA.

Here, the Clerk or PLSA exceeded his or her authority and invaded the exclusive province of the circuit court by determining Mitchell had not submitted all exhaustion documents and, accordingly, refused to file Mitchell's petition until May 17.

Mitchell recognizes that the Clerk or PLSA extended him the courtesy of notifying him via letter on May 4 that the Clerk or PLSA determined he had not included all exhaustion documents. Under Respondents' view, there is no incentive for any clerk or PLSA to extend such a courtesy when, as here, it is impossible for the prisoner to comply with

the request for additional documents within the statutory window for filing a petition.

Mitchell understands that PLSAs assist with the often cumbersome and voluminous requests from *pro se* prisoner litigants. This case, though, demonstrates that a PLSA's screening or review of prisoners' petitions might create a delay over which prisoners have no control. As a result, it is unreasonable to hold Mitchell accountable for the Clerk's or PLSA's decision to refuse to file his petition upon receipt when Mitchell otherwise complied with the Clerk/PLSA's request for additional documents and established he, in fact, had exhausted his administrative remedies.

In sum, because Mitchell complied with the 45-day deadline by mailing his petition to the Clerk, but the Clerk refused to file the petition upon receipt as Wis. Stat. § 59.40(2)(a) requires, the circuit court improperly rejected his petition as untimely (if tolling does not apply).

II. Dismissal of Mitchell's petition was not the required or appropriate remedy.

Even if Mitchell's petition were untimely, the appropriate remedy was denial of his request for fee waiver, not dismissal.

Respondents contend that Wis. Stats. §§ 801.02(7)(c) and 893.735, when read in conjunction with each other, establish that dismissal is a permitted remedy for the circumstance where a petition does not include all required exhaustion documents. (Resp. Br., pp. 23-25.) Respondents note that "[t]he court can still dismiss the case if the prisoner's omission of required documents results in an untimely filing pursuant to Wis. Stat. § 893.735(2)." (*Id.*, p. 25.)

Respondents do not address the important differences between § 893.735(2) and § 801.02(7)(c). Section 893.725(2) does not address a specific remedy for failure to include all

required exhaustion documents. Rather, that statute provides that untimely petitions are barred: “An action seeking a remedy available by certiorari made on behalf of a prisoner is barred unless commenced within 45 days after the cause of action accrues. . . .”

Meanwhile, unlike § 893.735(2), § 801.02(7)(c) not only specifically addresses the circumstance of a prisoner not providing all required exhaustion documents, but also specifically addresses the remedy—*i.e.*, denial of a fee petition—for a prisoner’s failure to do so:

At the time of filing . . . a common law writ of certiorari . . . a prisoner shall include, as part of the initial pleading, documentation showing that he or she has exhausted all available administrative remedies. . . . The court shall deny a prisoner’s request to proceed without the prepayment of fees and costs under s. 814.29(1m) if the prisoner fails to comply with this paragraph or if the prisoner has failed to exhaust all administrative remedies.

Wis. Stat. § 801.02(7)(c).

The remedies prescribed in § 893.735(2) and in § 801.02(7)(c) are in conflict, and where such conflict exists, the more specific statute—§ 801.02(7)(c)—controls. *Mueller*, 378 Wis. 2d 689, ¶11. As Respondents acknowledge, the remedy under § 801.02(7)(c) is denial of fee waiver.

Finally, dismissal is particularly inappropriate where, as here, Mitchell’s initial omission of certain exhaustion documents is harmless because he, in fact, exhausted his administrative remedies. No case bars the Court’s consideration of harmless error in these circumstances, and Respondents cite none. (*See* Resp. Br., p. 27 (citing case law

interpreting Wis. Stats. §§ 227.48, 227.53 for the proposition that untimely petitions result in a circuit court's lack of competency).)

CONCLUSION

This Court should reverse and remand with instructions that Mitchell's petition be deemed timely, pursuant to Wis. Stat. § 801.02(7).

Alternatively, if this Court concludes the petition was untimely, this Court should reverse and remand with instructions that the remedy for untimeliness is denial of Mitchell's request for fee waiver.

Dated this 16th day of January, 2024.

**Electronically signed by
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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wisconsin Statutes section 809.19(8)(b)–(c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,984 words.

Dated this 16th day of January, 2024.

Electronically signed by
Douglas M. Raines

CERTIFICATE OF SERVICE

I certify that on January 16, 2024, I electronically filed this brief using the Court's E-filing system, which will provide electronic service to all parties of record.

Dated this 16th day of January, 2024.

Electronically signed by
Douglas M. Raines