

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 27, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 99-0209-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN THE MATTER OF THE MENTAL CONDITION OF
THOMAS F.W.:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

THOMAS F.W.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Marquette County:
LEWIS MURACH, Judge. *Reversed and cause remanded with directions.*

EICH, J.¹ Thomas F.W. appeals from a ch. 51, STATS.,
recommitment order, claiming, alternatively, that: (1) his trial counsel was

¹ This appeal is decided by a single judge pursuant to § 752.31(2)(d), STATS.

ineffective for failing to timely demand a jury trial; and (2) the trial court erroneously exercised its discretion when it denied his request for a continuance. We conclude that, because it proceeded on an error of law in denying the continuance request, the court erroneously exercised its discretion in that regard. We therefore reverse the order and remand for further proceedings.²

The facts are undisputed. Thomas F.W.'s commitment was to expire if not extended by June 18, 1998. On May 5, the State petitioned for an extension and the recommitment trial was scheduled for Wednesday, May 27, 1998. Sometime after May 5, Attorney Eric Schulenburg was appointed by the State Public Defender to represent Thomas F.W. in the proceedings. Schulenburg met with Thomas F.W. on May 19, at which time Thomas F.W. indicated that he wished to have a jury trial.

Section 51.20(11), STATS., states that a jury trial in proceedings under ch. 51 is deemed waived "unless demanded at least 48 hours in advance of the time set for the final hearing." Schulenburg attempted to file a jury demand by facsimile (FAX) on Friday, May 22. On the same date he mailed a copy of the demand to the court. The FAX apparently arrived at the courthouse after the clerk's office was closed on May 22. Monday, May 25, was a holiday, Memorial Day, and the courthouse was closed. As a result, the court didn't receive notice of the jury demand until Tuesday, May 26, twenty-four hours before the scheduled hearing.

When, on May 27, the circuit court stated to counsel its belief that the jury demand was untimely filed, Schulenburg pointed out that, under

² Because we so decide, we do not reach the ineffective-assistance-of-counsel claim.

§ 990.001(4)(a), STATS., when a statutory deadline is stated in hours, rather than days, “the whole of Sunday and any legal holiday ... shall be excluded.”³ Thus, argued Schulenburg, his FAX having arrived at the courthouse on Friday afternoon, and excluding only Sunday and Monday, he had met the forty-eight-hour deadline. The circuit court rejected the argument without comment or explanation, stating only: “Well, I’m going to proceed with the matter as scheduled and I guess that can be one of the issues that goes up, if normal practice is followed.”

It is well-settled that a circuit court erroneously exercises its discretion when it bases a discretionary decision on an error of law. *State v. Wyss*, 124 Wis.2d 681, 734, 370 N.W.2d 745, 770 (1985), *overruled on other grounds*, *State v. Poellinger*, 153 Wis.2d 493, 451 N.W.2d 752 (1990). It appears to be undisputed that Schulenburg’s FAX arrived at the courthouse on Friday, May 22. At that time four days (ninety-six hours) remained prior to the scheduled hearing: Saturday, Sunday, Monday and Tuesday. Section 990.001(4)(a), STATS., excludes Sunday and Monday (forty-eight hours) from the statutory computation, leaving Saturday and Tuesday (forty-eight hours) before the date set for the hearing. We see no way around the plain wording of the statute; and, under its terms, the demand appears to have been timely filed.⁴

³ In its entirety, § 990.001(4)(a), STATS., reads:

the time within which an act is to be done ... shall be computed by excluding the first day and including the last; and when any such time is expressed in hours the whole of Sunday and of any legal holiday, from midnight to midnight, shall be excluded.

⁴ It is certainly arguable that, by excluding Saturday—a date on which it is known the courthouse will be closed—the statute effectively shortens the forty-eight-hour notice requirement of § 51.20(11), STATS., and in that sense it might be said that the statutes are inconsistent. When the legislature acts in a particular fashion, however, it is presumed to do so

(continued)

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published in the official reports. *See* RULE 809.23(1)(b)4, STATS.

with full knowledge of existing laws, *Modica v. Verhulst*, 195 Wis.2d 633, 641, 536 N.W.2d 466, 471 (1995); and, as indicated, the wording of § 990.001(4)(a), STATS., is indisputably clear on the point.

