

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 9, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

Appeal No. 2008AP2829

Cir. Ct. No. 2001ME263

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

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

DANE COUNTY,

PETITIONER-RESPONDENT,

v.

THOMAS F. W.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
DAVID T. FLANAGAN, III, Judge. *Affirmed.*

¶1 DYKMAN, J.¹ Thomas F.W. appeals from orders for recommitment and medication and an order denying his postdisposition motion. Thomas F.W. claims that the trial court lost competency to exercise its jurisdiction in his recommitment proceedings when the court dismissed the selected jury and postponed his jury trial for one week, thus extending the proceedings beyond the statutory time limits. We conclude that the record establishes that Thomas F.W. validly requested and received a seven-day postponement, as permitted by statute, and that the trial court therefore did not lose competency over this case. We affirm.

Background

¶2 The following facts are undisputed. Thomas F.W. was ordered involuntarily committed and medicated on December 20, 2007. His commitment was due to expire on February 12, 2008. On February 4, Dane County filed a petition to extend Thomas F.W.'s commitment. On February 6, Thomas F.W. demanded a jury trial in the recommitment proceedings, entitling him to a jury trial within fourteen days. *See* WIS. STAT. § 51.20(11)(a). Thus, Thomas F.W. was entitled to a jury trial by February 20, 2008.

¶3 The trial court held a final hearing on February 18. At the February 18 hearing, Thomas F.W. expressed dissatisfaction with the sitting judge. After jury selection, the sitting judge determined that Thomas F.W. had a right to request a new judge, and a substitute judge then began presiding over the proceedings.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶4 Thomas F.W. then expressed dissatisfaction with the selected jury. The court engaged Thomas F.W. in a colloquy, during which the court informed Thomas F.W. that selecting a new jury would result in a week-long delay in his trial. After confirming that Thomas F.W. still wanted a new jury, the court dismissed the jury and rescheduled the hearing for February 25, 2008. At the conclusion of the February 25 hearing, the jury found grounds to recommit Thomas F.W.

¶5 Thomas F.W. filed a postdisposition motion arguing that the court lost competency when it did not hold a final hearing within fourteen days of his demand for a jury trial. The court applied judicial estoppel to bar Thomas F.W.'s argument and denied the motion. Thomas F.W. appeals.

Standard of Review

¶6 Whether a trial court complied with statutory time limits, and thus retained competency, is a question of statutory interpretation, which we review de novo. *Waukesha County v. Darlene R.*, 201 Wis. 2d 633, 639, 549 N.W.2d 489 (Ct. App. 1996). “Moreover, we may affirm on grounds different than those relied on by the trial court.” *Vanstone v. Town of Delafield*, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995).

Discussion

¶7 Thomas F.W. argues that the trial court lost competency in his recommitment proceedings when it failed to conduct a jury trial by February 20, 2008. *See* WIS. STAT. § 51.20(11)(a) (jury trial must be held within fourteen days of demand). He argues that the trial court erred in applying judicial estoppel to bar his argument that it lost competency to proceed. The County responds that the

trial court correctly barred Thomas F.W.’s argument on judicial estoppel grounds, and also that Thomas F.W.’s argument fails on the merits because he requested and received a seven-day extension under WIS. STAT. § 51.20(10)(e). Thomas F.W. replies that he did not move for a postponement of his trial, but merely consented to a delay after requesting a new jury. We conclude that the record reveals that Thomas F.W. validly requested and received a seven-day extension, and that the court therefore did not lose competency to proceed.²

¶8 WISCONSIN STAT. § 51.20(10)(e) provides: “At the request of the subject individual or his or her counsel the final hearing under par. (c) may be postponed, but in no case may the postponement exceed 7 calendar days from the date established by the court under this subsection for the final hearing.” In this case, the court set the final hearing for February 18. At the hearing, the following exchange took place between the court and Thomas F.W.:

Q: Are you prepared to go forward?

A: I have an observation to some of the jurors that were struck and some of them that were chosen. I am not happy with the jury selection. I’m not happy with it.

Q: I see.

A: I don’t see it being anywhere in my favor.

Thomas F.W.’s counsel stated to the court:

² In its response brief, the County argues that the trial court erred in not finding that Thomas F.W. validly requested and received a seven-day postponement. Thomas F.W. replies that because the County frames its argument in terms of trial court error, it was required to file a cross-appeal. However, we do not reach the extension argument as a claim of trial court error. Instead, we reach it as an alternative ground for affirming the trial court’s decision. See *Vanstone v. Town of Delafield*, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995).

And, your Honor, I did speak with my client. From what I can understand, he objects to several people whom he thought would make good jurors were stricken by Corporation Counsel. I indicated there is nothing we can do about that, that is the right given to them by the statutes and the procedure. He asked me to ask the Court if it was possible to pick a new jury.

The court then stated it would determine whether potential jurors were still available. Counsel for the County stated: “Judge, I think we should make it perfectly clear on the record whether [Thomas F.W.]’s requesting a new panel. I get that impression....” The court then engaged Thomas F.W. in the following colloquy:

Q: Mr. [W.], are you asking me to discharge the panel of jurors that have been selected for this—

A: Yes.

Q: —trial?

A: Yes.

Q: And begin over with a new panel of jurors?

A: Yes. Yes, your Honor.

....

Q: [I]f you were to have another jury, ... we may have to set the trial over for a week Do you understand that?

A: I understand that. Yeah. I would go along with that for one week.

¶9 After the court determined potential jurors were no longer available, the County’s counsel stated: “Judge, I want to make sure that there is absolutely no objection on his part to having this matter postponed then for a week so we can get a new trial, because it will be outside the [14] days of his demand.” The court then conducted this exchange with Thomas F.W.:

Q: Mr. [W.], you have a right to have this trial be conducted within 14 days of [your request]. It will not be possible to do that unless we use the jury we have here. Do you want to have a—if you want a different jury we can do that, but it will delay the trial outside the 14 day limit and it won't be tried until this time next week. Do you understand that?

A: Yes.

Q: Is that what you wish to do?

A: Yes, a different jury.

Finally, the court engaged in the following colloquy with Thomas F.W.'s counsel:

Q: Counsel, have you had an opportunity to discuss with Mr. [W.] the advantages and disadvantages of using this jury as opposed to discharging this jury and having a different jury come in?

A: I discussed what would happen with this jury and without this jury. I discussed the mechanics would be the same either way. He is adamant he wants a different panel.

Q: All right. I find there to be a valid waiver of the right to have a trial within 14 days and certainly it is a request for a different jury.

¶10 Thomas F.W.'s attempts to construe his statements to the court at the February 18 hearing as something other than a request for a seven-day extension are unpersuasive. First, Thomas F.W. argues that he did not actually move the court for a postponement under WIS. STAT. § 51.20(10)(e). But Thomas F.W. does not explain why the unequivocal statements by him and his counsel that he wanted a new jury even though that would require a seven-day delay does not qualify as a request for a seven-day extension. Thomas F.W. cites to no authority requiring specific words to move the court for an extension under § 51.20(10)(e). The statute says only that “[a]t the request of the subject individual or his or her counsel the final hearing under par. (c) may be postponed, but in no case may the postponement exceed 7 calendar days from the date established by the court under

this subsection for the final hearing.” The statute does not define “request.” The dictionary, however, defines request as “[t]o ask for.” WEBSTER’S II NEW COLLEGE DICTIONARY 942 (1995). Clearly, from the record, Thomas F.W. and his counsel asked the court to delay the trial for one week to convene a new jury. Thomas F.W. has provided no reasoning as to why more was needed.

¶11 Thomas F.W. then argues that the court said Thomas F.W. “waived” his right to a jury trial within fourteen days rather than that he requested a postponement, and that the court failed to find that there was good cause for a postponement. Both arguments fail. Regardless of the words used by the court in granting Thomas F.W.’s request, Thomas F.W. unequivocally requested a new jury with full knowledge that his request would delay the trial for one week.³ WISCONSIN STAT. § 51.20(10)(e) requires no more, and says nothing of good cause for postponements. Accordingly, we affirm.⁴

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

³ In his brief-in-chief, Thomas F.W. asserts he could not have known the result of his complaint about the jury because he is mentally ill. We are not persuaded by this reasoning. First, WIS. STAT. § 51.20(10)(e) is directed toward a person subject to involuntary commitment based on mental illness. To conclude a person subject to involuntary commitment cannot request a postponement if he or she is mentally ill would be contrary to the statute itself. No one can be committed under ch. 51 unless they are mentally ill, drug-dependent or developmentally disabled. Subparagraphs 1. and 3. Additionally, the record makes clear that both Thomas F.W. and his counsel did, in fact, understand the result of Thomas F.W.’s complaint about the jury.

⁴ Because we conclude that the trial court validly granted Thomas F.W.’s request for a seven-day extension under 51.20(10)(e), we need not reach Thomas F.W.’s argument that the court improperly barred his argument on judicial estoppel grounds.

