

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 10, 2007

David R. Schanker
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP1123

Cir. Ct. No. 2002CI000004

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

IN RE THE COMMITMENT OF EDWARD COTTON:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

EDWARD COTTON,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Edward Cotton appeals from a judgment and a civil commitment order.¹ The issue is whether the trial court lost competency to proceed on the State’s petition to commit Cotton for failing to commence his commitment trial within forty-five days of the probable cause determination pursuant to WIS. STAT. § 980.05(1) (2001-02), without finding good cause for the delay.² We conclude that there was no loss of competency because the record independently establishes good cause for the delay. Therefore, we affirm.

¶2 On July 29, 1992, Cotton was convicted of a sexually violent offense. On December 16, 2002, the State filed a petition for Cotton’s detention pursuant to WIS. STAT. § 980.02(1)(b)1., within ninety days of his mandatory release date of December 20, 2002. Following Cotton’s request for judicial substitution, the trial court conducted a probable cause hearing on January 3, 2003.

¶3 At the probable cause hearing, the State sought a two-week adjournment to determine whether its petition was timely filed (within ninety days of Cotton’s mandatory release date). Cotton objected to the requested adjournment. The trial court ruled that, although the predecessor trial court had already ruled that the petition had been timely filed, it was amenable to address that issue again if Cotton filed a dispositive motion. At the close of that hearing, Cotton renewed his oral challenge to that issue, contending that “it’s still [the

¹ The judgment and commitment order were entered by the Honorable Mary M. Kuhnmuensch. The proceedings that are the subject of this appeal, however, were handled by the Honorable John A. Franke.

² All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

State's] burden to provide a reasonable theory on all four elements including the 90 day issue.”

¶4 The trial court responded:

On that particular matter [the trial court] ruled against you. [The trial court] held on the probable cause hearing under sub (3) the state does not have to prove up this 90 day element.

Now, if the state can't prove it, a person should not be held on a petition like this. Whether that's addressed by reopening the issue of cause under sub (1) or addressed on some kind of summary judgment motion is not a matter [the trial court is] going to resolve today and if you want to reconsider this question of whether it ought to have been proven and decided today, you can ask [the trial court] to reconsider that. But [the trial court is] going to leave the burden on [Cotton] here to proceed with some sort of motion or perhaps all three of those motions. And while [the trial court] do[es]n't want to delay things if this person is unlawfully being held, [the trial court] do[es]n't think it's going to delay things to proceed in this fashion, at least the 90 day issue ought to be decided promptly in terms of what the facts are and if there's a legal decision required as to whether a 90 day term is satisfied or not, that decision can be made quickly.

But cause has been found under sub (1) that this is a person eligible for commitment and that finding stands. It certainly can be reconsidered. [The trial court] ha[s] found probable cause that he's a sexually violent person and if that finding needed to include the 90 day issue, you can ask [the trial court] to reconsider that or the whole thing can be addressed in terms of summary judgment if the state clearly can't prove what it needs to prove at trial. So we're not going to set a date but we will do our best to accommodate any motion on this issue as promptly as possible. Anything else, [counsel]?

Both counsel responded that there was nothing else when asked in succession by the trial court. The trial court then “[a]djourned” the case.

¶5 On March 31, 2003, eighty-seven days after the probable cause hearing, Cotton moved to dismiss for failure to commence the commitment trial within forty-five days of the probable cause determination.³ See WIS. STAT. § 980.05(1). The trial court heard arguments on that motion on April 28, 2003, considerably past the forty-five-day deadline of § 980.05(1). Cotton contended that he was not obliged to challenge the ninety-day issue, and elected not to. The State claimed that it “definitely was interested in keeping this on track,” but contended that this case was “not your standard, average case ... because the Court put the burden on [Cotton] to file a motion.” The prosecutor (a different prosecutor than the one who appeared previously in the case) claimed to have been waiting for Cotton’s motion, or at least word from Cotton that he had decided not to file a motion on the ninety-day issue.

¶6 The trial court, recognizing the obvious predicament, began by acknowledging that “[t]his, clearly, was not handled well and not handled properly.” It then considered three options to remedy its potential loss of competency: the probable cause hearing had not concluded (thus, the forty-five days had not yet commenced to run); there was good cause for the delay; or Cotton was equitably estopped from asserting the forty-five-day limit. It rejected the first two reasons; it specifically rejected the good cause rationale because it was concerned about finding good cause retroactively. Instead, it denied dismissal on the basis of equitable estoppel. We are not persuaded that Cotton’s election not to challenge the timeliness of the petition (the ninety-day issue) equitably estopped

³ Cotton also moved to declare WIS. STAT. § 980.02(2)(c) unconstitutional. That motion is not relevant to this appeal.

him from seeking dismissal on the basis of the forty-five-day rule of WIS. STAT. § 980.05(1).

¶7 In *Matthew A.B.*, we affirmed the trial court’s order retroactively finding good cause to delay the commencement of trial past the forty-five-day deadline of WIS. STAT. § 980.05(1). See *State v. Matthew A.B.*, 231 Wis. 2d 688, 702-04, 605 N.W.2d 598 (Ct. App. 1999). In this case, the record establishes that the trial court could have found that good cause existed to extend the statutory deadline of § 980.05(1), to avoid any potential loss of competency when it adjourned the probable cause hearing.⁴ See *id.*; *State v. Holt*, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985) (“It is well-established that if a trial court reaches the proper result for the wrong reason, it will be affirmed.”).

¶8 The trial court was told by both the prosecutor and Cotton that the petition may not have been timely filed (within ninety days of Cotton’s mandatory release date). Indicating a willingness to entertain a dispositive motion on that issue, the trial court sought to decide the motion first because, depending on its decision, further proceedings may not have been necessary. It did not set a deadline for that motion or a trial date, anticipating the dispositive motion that the parties had discussed. The trial court sought to hear the prospective motion “as promptly as possible” before setting a trial date. In hindsight, setting a deadline for the motion, or expressly finding good cause for a prospective delay would have

⁴ We do not view Cotton’s inaction on a motion that he never assured the trial court or the State he would file, in a case with no deadline for filing such a motion, to equitably estop him from raising the procedural bar of the forty-five-day deadline, a different issue than that anticipated by the expected motion.

been preferable to anticipating the filing of an expected but unrequired motion; however, neither was requested nor occurred.

¶9 The trial court's rationale for expecting to decide the anticipated motion prior to scheduling the trial was reasonable. While it is not evident that a trial date would have been set had one been requested, it is reasonable from our review of the record that, at the time of the probable cause hearing, the trial court could have extended the forty-five-day deadline for good cause (to accommodate the prospective dispositive motion). We consequently conclude that when the trial court adjourned the case, anticipating Cotton's dispositive motion, there was good cause to extend the forty-five-day deadline. See *Matthew A.B.*, 231 Wis. 2d at 703-04. Under these circumstances, the trial court did not lose competency to proceed on the State's petition to commit Cotton for failing to start the trial within forty-five days of the probable cause determination.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2005-06).

