COURT OF APPEALS
DECISION
DATED AND FILED

August 13, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2372 **Cir. Ct. No. 2012CV754**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN EX REL. EDWARD C. COMPTON,

PETITIONER-APPELLANT,

V.

WAYNE WIEDENHOEFT, ACTING ADMINISTRATOR, DIVISION OF HEARINGS AND APPEALS,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Affirmed*.

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Edward C. Compton, *pro se*, appeals an order denying his petition for certiorari review of his extended-supervision revocation.

Because Compton failed to timely serve Administrator David H. Schwarz, resulting in a lack of personal jurisdiction, we affirm.[1]

BACKGROUND

¶2 We incorporate only those facts that are relevant to the jurisdictional issue before us. The final decision revoking Compton's term of extended supervision was issued on November 4, 2011. He subsequently sought certiorari review.

¶3 The State submits—and Compton does not refute—that the Administrator was not served in this matter until June 1, 2012, more than six months after the November 4, 2011, decision and more than five months after Compton filed a petition for a writ of certiorari in the original criminal case that resulted in his conviction.[2] As such, we deem this critical fact admitted. *See* ***State***

[1] David H. Schwarz was the administrator of the Division of Hearings and Appeals at the time this action was filed. Counsel for Schwarz subsequently notified this court of his requirement and advised that Wayne Wiedenhoeft is now the acting administrator. The caption of this case has been amended to reflect the change. *See* WIS. STAT. § 803.10(4) ("When a public officer … is a party to an action in an official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, … the successor is automatically substituted as a party.").

[2] There were procedural irregularities in this case. Compton initially filed a petition for a writ of certiorari in the original criminal case that resulted in his conviction, ***State v. Compton***, Winnebago Cnty. Case No. 2003CF181. According to Consolidated Court Automated Programs (CCAP) records, it was not until May of 2012, more than six months after the Administrator's decision issued on November 4, 2011, that Compton commenced the action underlying this appeal by filing an affidavit for a writ of certiorari, ***Compton v. Schwarz***, Winnebago Cnty. Case No. 2012CV754. The State asserts that the untimely filing of his petition resulted in a lack of subject matter jurisdiction. *See* WIS. STAT. § 893.735(2) ("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. The 45-day period shall begin on the date of the decision or disposition," unless there is an issue as to actual notice.); *see also* ***State ex rel. Collins v. Cooke***, 2000 WI App 101, ¶5, 235 Wis. 2d 63, 67, 611 N.W.2d 774, 776 ("'Failure to timely file [petition for writ of certiorari] requires dismissal for lack of subject matter jurisdiction.'") (citation omitted). For purposes of resolving this appeal, we do not delve into the additional jurisdictional issue posed by this case. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive (continued)

v. Bean, 2011 WI App 129, ¶24 n.5, 337 Wis. 2d 406, 419 n.5, 804 N.W.2d 696, 703 n.5 ("unrefuted facts are deemed admitted").

¶4 Following a hearing, the circuit court denied Compton's petition. On appeal, Compton raises a number of challenges, primarily focused on evidentiary and procedural concerns related to the underlying revocation proceedings. In its response, the State argues, among other things, that jurisdiction is lacking in this case.[3] Compton does not address the issue in his briefs.

DISCUSSION

¶5 WISCONSIN STAT. § 801.02 governs the commencement of actions and provides in relevant part:

> **(1)** Except as provided in [WIS. STAT. §] 20.931(5)(b), a civil action in which a personal judgment is sought is commenced as to any defendant when a summons and a complaint naming the person as defendant are filed with the court, provided service of an authenticated copy of the summons and of the complaint is made upon the defendant under this chapter within 90 days after filing.
>
> ….
>
> **(5)** *An action seeking a remedy available by certiorari … may be commenced under sub. (1), by service of an appropriate original writ on the defendant named in the writ if a copy of the writ is filed forthwith*, or by filing a complaint demanding and specifying the remedy, if service of an authenticated copy of the complaint and of an order signed by the judge of the court in which the complaint is filed is made upon the defendant under this chapter within the time period specified in the order.

---

issue need be addressed). Instead, we save the issue of subject matter jurisdiction for another day and focus solely on the lack of personal jurisdiction.

[3] We note that the State filed a motion to dismiss on this basis, which the circuit court denied.

(Emphasis added.) Thus, the statute makes clear that "there are two different procedures which can be used to commence certiorari review—a complaint procedure and a writ procedure." ***State ex. rel DNR v. Walworth Cnty. Bd. of Adjustment***, 170 Wis. 2d 406, 415, 489 N.W.2d 631, 634 (Ct. App. 1992). "[I]f an appellant employs the *writ* procedure, commencement of the appeal is measured by the act of *serving* the *original* writ, provided that a copy of the writ is filed 'forthwith.'" ***Id.***, 170 Wis. 2d at 416, 489 N.W.2d at 634–635.

¶6 Here, Compton intended to use the writ procedure. He did not, however, serve the Administrator in compliance with WIS. STAT. § 801.02. "Failure to obtain personal jurisdiction over the defendant by statutorily proper service of process is a fundamental defect fatal to the action, regardless of prejudice." ***Hagen v. City of Milwaukee Employes' Retirement System Annuity & Pension Bd.***, 2003 WI 56, ¶13, 262 Wis. 2d 113, 119, 663 N.W.2d 268, 271. This rule applies to certiorari proceedings just as it applies in other actions. *See* ***State ex. rel DNR***, 170 Wis. 2d at 418–419, 489 N.W.2d at 636 (circuit court lacked jurisdiction where town failed to timely serve writ of certiorari).

¶7 We agree with the State that the failure to timely serve the Administrator provided a basis on which the circuit court could have dismissed this case. Insofar as we are affirming on a basis other than what was stated by the circuit court, it is within our power to do so.[4] *See* ***Glendenning's Limestone &***

[4] The circuit court's order provided that Compton's petition was "denied for all the reasons stated on the record." The transcript of the hearing related to the order being appealed is not part of the appellate record. (CCAP records reveal that the court reporter sent a letter to Compton in response to the statement on transcript he filed requesting the hearing transcript. The court reporter's letter is not part of the record in this matter and the transcript was never filed.) It was Compton's obligation to ensure that the record is complete. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26–27, 496 N.W.2d 226, 232 (Ct. App. 1993) (it is the appellant's responsibility to ensure that the appellate record is complete). The transcript was not, however, necessary for (continued)

Ready-Mix Co. v. Reimer, 2006 WI App 161, ¶14, 295 Wis. 2d 556, 568, 721 N.W.2d 704, 709 (court of appeals "may affirm the circuit court on an alternative ground as long as the record is adequate and the parties have the opportunity to brief the issue on appeal").

By the Court.—Order affirmed.

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

---

our resolution of this appeal because the issue of personal jurisdictional is subject to our independent review. *See* ***Brown v. LaChance***, 165 Wis. 2d 52, 65, 477 N.W.2d 296, 302 (Ct. App. 1991) ("Personal jurisdiction is a question of law that we review *de novo*.").

We note that Compton asserts he "was not present at the hearing and allowed to state his issues on the record." It appears he was represented by counsel below, who presumably would have been at the hearing. Moreover, to the extent this is an argument, we conclude it is undeveloped and do not consider it further. *See* ***League of Women Voters v. Madison Cmty. Found.***, 2005 WI App 239, ¶19, 288 Wis. 2d 128, 140, 707 N.W.2d 285, 291. Finally, attendance or no attendance, Compton's jurisdictional problem remains.