

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 30, 2014

Diane M. Fremgen
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. 2014AP1632

Cir. Ct. No. 2013SC6232

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

ANTHONY ELLIS,

PLAINTIFF-APPELLANT,

V.

SHERRY MILLER AND BRIAN FOSTER,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
JULIE GENOVESE, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ Anthony Ellis, an inmate at a state correctional center, appeals pro se from the circuit court's order dismissing Ellis's small claims

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version, the version in effect at all pertinent times here.

trial demand as untimely. Ellis argues that his demand was timely under the “prison mailbox rule,” a tolling rule that courts have applied to certain types of filings by prisoners. *See, e.g., State ex rel. Griffin v. Smith*, 2004 WI 36, ¶¶36-37, 270 Wis. 2d 235, 677 N.W.2d 259. Assuming, without deciding, that the rule applies to small claims trial demands, I agree with the State that Ellis failed to submit the type of proof that is required to receive the benefit of the rule. I therefore affirm the circuit court’s dismissal order.

Background

¶2 The underlying allegations in Ellis’s small claims action are not material to the issue I decide on appeal. Suffice it to say that the allegations relate to a claim that one or more prison officials violated Ellis’s rights based on the search and seizure of a computer disk.

¶3 It is undisputed that the deadline for Ellis’s small claims trial demand fell on January 4, 2014, a Saturday, and that the circuit court received the demand for filing on January 6, the following Monday. As already indicated, the circuit court dismissed the demand as untimely.

Discussion

¶4 Ellis’s sole basis on appeal for arguing that the circuit court erred in dismissing his demand is Ellis’s argument that the prison mailbox rule applies. In the circuit court, the parties also briefed whether WIS. STAT. § 801.15(1)(b) or WIS. STAT. § 990.001(4)(c) applies to extend Ellis’s Saturday deadline to the following Monday. The circuit court ruled that those statutory provisions do not apply to small claims trial demands. Ellis does not challenge this ruling on appeal, so I deem it abandoned and limit my discussion to Ellis’s prison mailbox rule

argument. *See A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) (“[A]n issue raised in the [circuit] court, but not raised on appeal, is deemed abandoned.”).

¶5 In *State ex rel. Shimkus v. Sondalle*, 2000 WI App 262, 240 Wis. 2d 310, 622 N.W.2d 763, we addressed what proof an inmate must present to receive the benefit of the prison mailbox rule. *See id.*, ¶¶2, 13-15. We said that the inmate “must present evidence of the date on which he or she deposited the petition [for certiorari review of a prison disciplinary decision] in the institution mailbox for forwarding to the clerk of courts for filing.” *Id.*, ¶15.

¶6 As with a petition for certiorari review, a small claims trial demand must be filed with the circuit court. *See* WIS. STAT. § 799.207(3)(c). Thus, applying *Shimkus*, Ellis needed to submit proof of the date on which he deposited his demand in the institution mailbox for forwarding to the circuit court clerk for filing.

¶7 Ellis appears to rely on three possible sources of proof: (1) unsworn assertions in his briefs, (2) affidavits of mailing, and (3) institution disbursement request receipts. He argues that these sources establish that he deposited his demand in the institution mailbox on January 2, that the demand was returned to him for a funds-related issue out of his control, and that he re-deposited the demand in the institution mailbox on January 3. Ellis argues that his January 4 deadline should have been tolled from January 2 or January 3 until January 6, the date the circuit court received his demand.

¶8 As to unsworn assertions in briefs, we said in *Shimkus* that such assertions are insufficient. *Shimkus*, 240 Wis. 2d 310, ¶14. Similarly, Ellis’s disbursement request receipts, which show requests on January 2 and January 3,

and an approval on January 3, are insufficient under *Shimkus*. See *id.*, ¶12. We explained in *Shimkus* that this type of evidence of disbursement requests is inadequate because, while one reasonable inference might be that an inmate deposited a petition (or in this case, a trial demand) in an institution mailbox on the same day as the request, another reasonable inference is that the inmate made the deposit at some unknown time after the request was approved. See *id.*

¶9 As to Ellis's affidavits of mailing, the State correctly points out that Ellis's affidavits do not contain proof that Ellis deposited his demand in the institution mailbox on January 2 or January 3 for *filing in the circuit court*. Rather, the documents at most appear to contain proof that Ellis placed copies of his demand in the institution mailbox for mailing *to one or more of the parties or attorneys* on those dates.

¶10 In his reply brief, Ellis argues that his affidavits of mailing should be deemed sufficient because he was following the written advice shown on the standard court form he used to make his demand. That form states:

You must be able to prove you mailed or delivered copies to the other parties and attorney (if any). You should file your proof of mailing or delivery at the time you file your Demand for Trial. Proof of mailing includes, but is not limited to, a return receipt for certified or registered mail, a post office certificate of mailing, or a notarized affidavit of mailing.

This argument comes too late, and I could ignore it as such. See *A.O. Smith Corp.*, 222 Wis. 2d at 492 (court of appeals generally does not address arguments raised for the first time in a reply brief). However, I choose to address the argument and explain why it has no merit.

¶11 I begin by observing that the form is not specific to prisoners or to the prison mailbox rule. Rather, it is a general form intended for all litigants. The form is plainly not intended to speak to the requirements of the prison mailbox rule. Next, I observe that other language in the form expressly states that the person demanding a trial must “file with the court” the demand, as well as mail copies of the demand to the parties. Even the language that Ellis quotes refers to the need to “*file* your Demand for Trial” (emphasis added). Thus, the form makes clear, consistent with the applicable statute, that the demand must be filed in the circuit court. I see nothing in the form that can reasonably be read as excusing Ellis from the corresponding requirement under *Shimkus* that, to invoke the prison mailbox rule, Ellis must submit proof of the date he deposited his demand in the institution mailbox for forwarding to the circuit court.

¶12 Before proceeding I note that, given Ellis’s Saturday, January 4 deadline and the circuit court’s receipt of Ellis’s demand on Monday, January 6, a reader might wonder whether the only reasonable inference is that Ellis must have deposited his demand in the institution mailbox no later than the Saturday before the Monday, making his demand timely under the prison mailbox rule. I wonder that too, but this is not an argument Ellis has advanced. Rather, as discussed, Ellis argues that he supplied proof that he deposited his demand in the institution mailbox first on January 2, and then again on January 3 after the demand was returned to him. And, as I have concluded, Ellis did not provide sufficient proof as to those dates. Because it occurs to me that there are other possibilities than that Ellis deposited his demand on the Saturday, without briefing on appeal and without briefing or factual development by Ellis in the circuit court I am not willing to say that the only reasonable inference is that Ellis must have deposited his demand in the institution mailbox no later than that Saturday. *See State v.*

Rogers, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995) (court of appeals will not “blindsides trial courts with reversals based on theories which did not originate in their forum”); *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not consider inadequately developed arguments; “We cannot serve as both advocate and judge.”).

¶13 Ellis states a second issue on appeal: whether the circuit court should have addressed Ellis’s motion for leave to amend or supplement his complaint. As far as I can tell, however, this issue is rendered moot by my resolution of the trial demand issue. I therefore do not address this second issue. *See Skrupky v. Elbert*, 189 Wis. 2d 31, 47, 526 N.W.2d 264 (Ct. App. 1994) (if a decision on one issue disposes of the appeal, the appellate court need not decide other issues raised).

¶14 For the reasons above, I affirm the circuit court’s order dismissing Ellis’s demand for a small claims trial.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.

