STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2017AP000228-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

JULIO CESAR PACHECO ARIAS,

Defendant-Respondent.

ON APPEAL FROM THE ORDER OF DISMISSAL
ENTERED IN THE
MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE HANNAH C. DUGAN, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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ISSUE PRESENTED

Was Pacheco Arias' right to speedy trial violated, such that dismissal with prejudice was a proper remedy?

Answer: The Trial Court answered yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. This case can be resolved by applying well-established legal principles to the facts of the case and will not meet the criteria for publication. See Wis. Stat (Rule) 809.22(2) and 809.23(1)(b).

STATEMENT OF THE CASE

Julio Pacheco-Arias was arrested on August 15, 2015, by the West Allis Police Department for Operating While Intoxicated. (R2:1-3; App. 101-103). On September 3, 2015, a criminal complaint was filed against Pacheco-Arias in Milwaukee County Case Number 2015CT001832 (herein referred to as the "latter case"), alleging Operating A Motor Vehicle While Intoxicated – 3rd Offense. (R2:1-3; App. 101-103). According to the Public Records of the Wisconsin Circuit Court ("CCAP"), Pacheco-Arias posted $850 cash bond on August 24, 2015. (R1).

Pacheco-Arias was also arrested on August 1, 2015, by the West Allis Police Department for Operating While Intoxicated. On August 19, 2015, a criminal complaint was filed against Pacheco-Arias in Milwaukee County Case Number 2015CT001693 (herein referred to as the "earlier case"), also alleging Operating A Motor Vehicle While Intoxicated – 3rd Offense. According to CCAP, Pacheco-Arias posted $1,100 cash bond on August 4, 2015.

The criminal complaints in both cases were based upon records of the Wisconsin Department of Transportation, Division of Motor Vehicles, that indicated Pacheco-Arias had been convicted of or revoked for an Operating While Intoxicated offense, as counted under Wisconsin Statute Section 343.307(1), on two prior occasions.[1] *Id.* Pacheco-Arias had his initial appearance on the earlier case on August 31, 2015, and his initial appearance on the latter case on October 16, 2015. (R7). After these dates, the two cases generally

[1] Those records indicate Pacheco-Arias was convicted on January 26, 2006, in Illinois and on September 8, 2008, in Kenosha, Wisconsin.

appeared in court together from October 31, 2015, until October 3, 2016. The following is a summary of all the court dates for the latter case.

On October 16, 2015, Pacheco-Arias had his initial appearance and a status conference was set for October 30, 2015. (R31:3-4). On October 30, 2015, Pacheco-Arias moved to adjourn the status conference to conduct further investigation and the case was set for November 16, 2015. (R32:3-4). On November 16, 2015, Pacheco-Arias again moved to adjourn the status conference and a second status conference was set for January 6, 2016. (R33:2-4). On January 6, 2016, the status conference was adjourned for a projected guilty plea on February 25, 2016. (R34:3-4). On February 25, 2016, the case was adjourned for another projected guilty plea date. (R11). On March 18, 2016, the State's file was not in court and the case was adjourned and scheduled for a plea/sentencing for April 13, 2016. (R13).

On April 13, 2016, Pacheco-Arias, through his initial counsel, Attorney Allison Ritter, requested an adjournment to contact an attorney that deals with immigration issues who could handle both the criminal cases and the immigration matter Pacheco Arias potentially faced. (R35:2-4). The case was adjourned for a status conference on May 10, 2016. *Id.* On May 10, 2016, the court ordered the case be adjourned for a status conference on May 31, 2016. (R16). On May 31, 2016, Pacheco-Arias appeared with new counsel, Attorney Sardar Nasis Durani, who stated that he represented Pacheco-Arias and the court ordered the case be adjourned for a status conference on June 17, 2016. (R36: 3-6). On June 17, 2016, Pacheco-Arias appeared with Attorney Jeffery Jensen and Attorney Durani. (R37). The court ordered the case be adjourned for a status conference on July 27, 2016. *Id*.:3-5.

On July 27, 2016, both cases appeared in court in front of Judge Michael J. Hanrahan for status conferences. (R38; App. 122-136). Assistant District Attorney Joy Hammond appeared on behalf of the State. *Id.* At this conference, Pacheco-Arias asked the court to set the latter case for trial because it was more defensible and asked that the earlier case tag along with it. (R38:3-4, 9-11; App. 124-125, 130-132). The State objected, arguing that the earlier case should be set first

so the two cases could be resolved in the correct chronological order so that the Operating While Intoxicated penalty structure is not circumvented. (R38:3-11; App. 124-132). After hearing arguments from both parties, Judge Hanrahan stated the following:

> Well I'm going to, in a sense, punt by setting the August 15th case for trial. And if the State wants to dismiss it, which, you know, they can certainly move to dismiss and give their rational to the Court as to the basis for doing that, the Court can make a determination at that time. Although the Court believes that's an appropriate exercise of their prosecutorial discretion, then it will be dismissed without prejudice, and if not, we go to trial.

(R38:12; App. 133).

Afterwards, a jury trial date for the latter case was set for October 3, 2016, at 8:30. (R38:12; App. 133). The court asked Assistant District Attorney Hammond if they needed to consult with the state lab, to which she responded, "[w]ell, considering I don't think the State has any intent on going forward on the date…" (R38:12-13; App. 133-134). Finally, a final pretrial date of September 6, 2016, at 8:30 a.m. was set, where parties were asked to file their witness list, jury instructions, and any motions in limine by that date. (R38:13-14; App. 134-135). The case was then reassigned to Judge Hannah Dugan. (R38:13-14; App. 134-135).

On September 6, 2016, Assistant District Attorney May Lee appeared on behalf of the State for the final pretrial. (R39:1). Pacheco-Arias stated they were firm for trial on October 3, 2016. (R39:2). The State indicated they had not filed jury instructions or motions in limine and the court asked the State to file those documents by September 20, 2016. (R39:3-4). On October 3, 2016, Assistant District Attorneys Taylor Kraus and Randy Sitzberger appeared on behalf of the State for the jury trial and moved to dismiss the latter case and asked the earlier case be set for a jury trial or a plea. (R40:1-11). Pacheco-Arias objected to the dismissal unless it was with prejudice. (R40:4). The State renewed its previous argument that it is in the public's interest that the cases should be handled chronologically, which would have the ultimate result of the latter case becoming a felony if Pacheco-Arias were found

guilty on the earlier case. (R40:1-11). Pacheco-Arias argued the State was attempting to circumvent Judge Hanrahan's scheduling order by moving to dismiss on the day of trial and that nothing was said at the final pretrial. (R40:4, 8, 11-2). After hearing arguments from both sides, Judge Dugan set the case for a motion hearing to determine whether it should be dismissed with or without prejudice. (R40:12). Both parties submitted written briefs on the issue. (R22, R23; App. 104-109, App. 110-116).

In his brief, Pacheco-Arias argued that the court must dismiss with prejudice because the State deliberately engaged in conduct that denied Pacheco-Arias his constitutional speedy trail rights and circumvent the court's scheduling order. (R22; App. 104-109). The State responded that Pacheco-Arias's right to a speedy trial was not violated and argued that public policy dictated that the earlier case should be handled before the latter case. (R23; App. 110-116).

On November 30, 2016, Assistant District Attorney Francesco Mineo appeared on behalf of the State at the motion hearing. (R42:1). Judge Dugan heard arguments from both parties and set a date to issue a written decision on the matter. (R42:1-18). On December 22, 2016, Judge Dugan issued a written decision granting Pacheco-Arias's Motion to Dismiss with Prejudice. (R25; R43). The written decision lists the case dismissed with Prejudice as 2015CT1693. (R25). However, that written decision listed the erroneous case number which was corrected on January 20, 2017, to reflect 2015CT. (R44). The State filed its Notice of Appeal with the circuit court on February 3, 2017. (R27).

STANDARD OF REVIEW

Whether a defendant has been denied his constitutional right to a speedy trial presents a question of law, which this court reviews de novo, while accepting any findings of fact made by the circuit court unless they are clearly erroneous. *State v. Leighton*, 2000 WI App 156, ¶ 5, 237 Wis. 2d 709, 616 N.W.2d 126.

In this case, the Court made the following findings: (1) The length of delay approaching a year after accusation is

presumptively prejudicial; (2) The State deliberately delayed the trial; (3) Pacheco Arias implicitly asserted his rights to a speedy trial. (R25).

ARGUMENT

I. Pacheco-Arias's constitutional right to a speedy trial was not violated.

A. Applicable legal standard.

Wisconsin courts use the four-part balancing test established in *Barker v. Wingo*, 407 U.S. 514 (1972), to determine if an accused's right to a speedy trial was violated under the Wisconsin and Federal Constitutions. *State v. Urdahl*, 2005 WI App 191, ¶ 11, 286 Wis. 2d 476, 704 N.W.2d 324. The factors considered are, "(1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant." *Id*. "The right to a speedy trial is not subject to a bright line determination and must be considered based on the totality of circumstances that exist in the specific case." *Id.*

B. The length of the delay.

The first *Barker* factor is the length of the delay. "[T]he court must determine that the length of the delay is presumptively prejudicial before inquiry can be made into the remaining three factors." *Leighton*, 2000 WI App 156, ¶ 7. In general, a post-accusation delay approaching a year is presumptively prejudicial. *Urdahl*, 2005 WI App 191, ¶ 12. However, if the delay is found to be presumptively prejudicial, the length of delay is only one factor of the four-factor balancing test. *Id.*

The State agrees that the time from the filing of the criminal complaint in the latter case on September 3, 2015, and the scheduled jury trial date of October 3, 2016, is thirteen months and is slightly over one year and therefore presumptively prejudicial. As such, this court must examine the remaining three *Barker* factors.

C. The reasons for the delay.

The second *Barker* factor is the reasons for the delay. Courts identify each portion of the delay and "accord different treatment to each category of reasons." *Id.* ¶ 26.

> A deliberate attempt by the government to delay the trial in order to hamper the defense is weighted heavily against the State, while delays caused by the government's negligence or overcrowded courts, though still counted, are weighted less heavily.

Id. As such, "preconviction delay is not to be weighed heavily against the state if it was not intentional and not motivated by a desire to disadvantage the defense in preparation of his or her defense." *State v. Allen*, 179 Wis. 2d 67, 77, 505 N.W.2d 801 (Ct. App. 1993).

Furthermore, "if the delay is caused by the defendant, it is not counted." *Id.* If the delay is "required for the orderly administration of criminal justice" it is not attributable to either the state or defense and not included when consider this factor. *Scarborough v. State*, 76 Wis. 2d 87, 101, 250 N.W.2d 354 (1977).

The State argues that only a period of two months is attributable to the State: (1) the period between March 8, 2016, when the State did not have their file in court, to April 13, 2016; and (2) the period between September 6, 2016, the date of the final pretrial, and October 3, 2016, the date of the jury trial.

The State argues that a period of eleven months should not be counted because the delay was either caused by Pacheco-Arias or it was "required for the orderly administration of criminal justice": (1) the period between September 10, 2015, when the complaint was filed in the latter case, and October 30, 2015 for a status conference; (2) the period between October 30, 2015, when Pacheco-Arias moved to adjourn and requested a status conference to conduct investigation, to November 16, 2015; (3) the period between November 16, 2015, when Pacheco-Arias requested another adjournment for another status conference, to January 6, 2016; (4) the period between January 6, 2016, when Pacheco-Arias

requested a projected guilty plea date, until February 25, 2016; (5) the period between February 25, 2016, when the case was adjourned, until March 18, 2016; (6) the period between April 13, 2016, when Pacheco-Arias requested an adjournment and discussed retaining new counsel, until May 10, 2016; (7) the period between May 10, 2016, when the court was in trial and ordered the case adjourned, until May 31, 2016; (8) the period between May 31, 2016, when Pacheco-Arias appeared with a new attorney and the court set the earlier case for a final pretrial, June 17, 2016, and a jury trial, July 13, 2016, and a status date for the latter case, until June 17, 2016; (9) the period between June 17, 2016, the defendant appeared with Attorney Jensen for the first time and defense requested an adjournment for the earlier case's jury trial date and a status date for the latter case, until July 27, 2016; (10) the period between July 27, 2016, when Pacheco-Arias requested a final pretrial and jury trial date in the latter case, until September 6, 2016.

The State's failure to have their file in court on March 8, 2016, was not intentional or motivated by a desire to disadvantage Pacheco-Arias in preparation of his defense. The State's failure to bring its motion to dismiss at the final pretrial date, September 6, 2016, was not done deliberately, but as the State argued on November 30, 2016, the product of miscommunication between the various prosecutors who had been handling the case. (R42).

It has been the State's intention to resolve Pacheco-Arias's earlier case before the latter case since the very beginning. (R33 and R36). The State requested the dismissal of this case based on its interpretation of §346.65(2)(am)4m, the statute encompassing operating a motor vehicle while under the influence penalties. Statute 346.65(2)(am)4m states:

> Except as provided in pars. (f) and (g), is guilty of a Class H felony and shall be fined not less than $600 and imprisoned for not less than 6 months if the number of convictions under ss. 940.09(1) and 940.25 in the person's lifetime, plus the total number of suspensions, revocations, and other convictions counted under s. 343.307(1), *equals 4 and the person committed an offense that resulted in a suspension , revocation, or other conviction counted under s. 343.307(1) within 5 years prior to the day of current offense.*…. (emphasis added).

Therefore, if Pacheco-Arias was convicted of the August 15, 2015 incident before the August 1, 2015 incident, Pacheco-Arias would not have a prior conviction with a violation date within the last five years and Pacheco-Arias would avoid a felony charge.[2] The legislature has made it clear that it intends the "vigorous prosecution" of operating a motor vehicle while intoxicated offenses. §967.055(1)a. Here, the State moved to dismiss the present case in order to vigorously prosecute the offense and to prevent Pacheco-Arias from taking advantage of a loophole due to being charged with two offenses that occurred within a very short interval.

The two months attributable to the State should not be weighed heavily against the State. However, Judge Dugan found that by failing to bring the motion at the final pretrial and failing to subpoena witnesses for the jury trial that it was a "deliberate attempt by the government to delay the trial in order to hamper the defense" and "is heavily weighed against the State." *Urdahl*, 2005 WI App 191, ¶ 485; R25:4. Judge Dugan also incorrectly factored in the time anticipated if the latter case were dismissed and reissued as a felony charge. (R25:4).

D. Pacheco-Arias's assertion of his speedy trial right.

The third *Barker* factor is whether the defendant asserted his right to a speedy trial. The United States Supreme Court stated , "[w]e emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Barker*, 407 U.S. at 527, 532. "[T]he purpose of requiring some showing of assertion of right [is] necessary to distinguish cases … where there [is] evidence that the defendant did not want to be brought to trial." *Hadley v. State*, 66 Wis. 2d 350, 361, 225 N.W.2d 461 (1975). In her written decision, Judge Dugan stated that,

> Further, implicitly Defendant asserted his right to a speedy trial during his arguments before Judge Hanrahan. He asserted his trial rights on the date of Judge Hanrahan's decision, via scheduling his

[2] The Legislature remedied this concern effective January 1, 2017, by eliminating the within five years requirement when it repealed this stature and made all operating a motor vehicle while under the influence offenses with four convictions a felony in 2016 Wisconsin Act 371.

> trial and he affirmed his speedy trial rights at the Final Pretrial Conference in September 2016.

(R25:4).

There is nothing in the record, nor any legal authority cited by Judge Dugan, that supports a finding that Pacheco-Arias implicitly asserted his right to a speedy trial on July 27, 2016, in front of Judge Hanrahan, or at the final pretrial on September 6, 2016. Other than the somewhat unique nature of having two open OWI – 3rd cases simultaneously, the request for a trial date in the latter case was nothing more than simply that. To hold that Pacheco-Arias implicitly asserted his right to a speedy trial by requesting a trial date would lead to the absurd result that any defendant who requests a trial date is exercising his assertion for a speedy trial demand. This notion is in direct contradiction with established and longstanding Wisconsin and United States Supreme Court case law.

E. Prejudice to Pacheco-Arias.

The fourth *Barker* factor is whether the delay prejudiced the defendant. When considering prejudice, courts consider three interests that the right to a speedy trial protects; (1) prevention of oppressive pretrial incarceration, (2) prevention of anxiety and concern by the accused, and (3) the prevention or impairment of defense. *Urdahl*, 2000 WI App 191, ¶ 34.

Addressing the first consideration, Pacheco-Arias posted bail and was only incarcerated for an initial six days before he posted bail. (R1) As such, this court should find that this consideration is not implicated in this case.

Addressing the second consideration, nothing in the record supports a finding that Pacheco Arias experienced more anxiety than that of a typical defendant in a criminal case. "[W]ithout more than the bare fact of unresolved charges-which exists in every criminal case-we view the prejudice to the second interest as minimal." *Id.* at 35.

The third interest "is the most significant because the inability of a defendant [to] adequately … prepare his case skews his fairness of the entire system." *Id.* at 34 (internal

citations omitted). "The defense may be impaired (1) if witnesses die or disappear during a delay; (2) if defense witnesses are unable to recall accurately events of the distant past; or (3) if a defendant is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Leighton*, 2000 WI App 156, ¶ 23 (internal citations omitted). In her written decision, Judge Dugan stated that,

> The prejudice to the Defendant is clear: his stated concerns were addressed in July and the decision and order by Judge Hanrahan mitigated potential prejudice to him. Had he felt otherwise or if he believed prejudice was possible by Judge Hanrahan's order, he could have appealed the decision and order.

(R25:4).

Pacheco-Arias's stated concerns in July were: (1) possible immigration issues that could arise if he ended up with two convictions or if Pacheco-Arias was convicted of a felony; (2) the latter case was defensible, while the earlier case is likely not; (3) handling the earlier case first would result in Pacheco-Arias going to trial on both cases instead of just the latter case and likely pleading guilty to the earlier case. (R38).

The State acknowledges each of Pacheco-Arias's stated concerns, however the State's motion to dismiss the latter case without prejudice did not prejudice Pacheco-Arias by impairing his ability to defend himself in that case. Pacheco-Arias had not planned to call any witnesses, nor would any of the State's witnesses been unavailable had the case been reissued. Nothing hindered Pacheco-Arias's ability to gather evidence, contact witnesses, or otherwise prepare for his defense.

In the case at hand, the case was dismissed with prejudice as a speedy trial violation for the State's failure to bring the motion to dismiss at the final pretrial and not subpoenaing any witnesses to a trial. Once this case was set for trial, the State's position was that this case should be dismissed in order for the chronologically earlier case to proceed first so that Pacheco Arias was unable to take advantage of the loophole in the law. Failing to bring the motion to dismiss at the final pretrial can be attributed to a miscommunication between the District Attorney's office. However, this failure in

no way prejudiced Pacheco-Arias's ability to defend himself in either of his cases.

F. Balancing the *Barker* factors demonstrates that Pacheco-Arias's right to a speedy trial was not violated.

Applying the *Barker* factors shows Pacheco-Arias's speedy trial rights were not violated. Only two months of delay are attributable to the State and are not weighed heavily against the State because the delay was not intentional or with the attempt to disadvantage Pacheco-Arias. Pacheco-Arias was out on bail throughout the court proceedings. Pacheco-Arias never asserted his right to a speedy trial. Most importantly of all, there is nothing in the record to support a finding that Pacheco-Arias was impaired by any delay. As such, there is no factual basis to find that Pacheco-Arias's right to a speedy trial was violated.

CONCLUSION

The court should reverse the trial court's decision dismissing Pacheco-Arias's case with prejudice as the State did not violate Pacheco-Arias's speedy trial rights when applying the *Barker* factors.

Dated this _____ day of May, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 3,681.

_____ _____

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19 (12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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