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State of Wisconsin
Court of Appeals
District 1
Appeal No. 2017AP000228-CR

State of Wisconsin,

Plaintiff-Appellant,

v.

Julio Pacheco-Arias,

Defendant-Respondent.

On appeal from a judgment of the Milwaukee County Circuit Court, The Honorable Hannah Dugan, presiding

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Defendant-Respondent's Brief and Appendix

Law Offices of Jeffrey W. Jensen
111 E. Wisconsin Avenue, Suite 1925
Milwaukee, WI 53202-4825

414-671-9484

Attorneys for the Respondent

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Statement on Oral Argument and Publication

The issue presented by this appeal is controlled by well-settled law. Therefore, the respondent does not recommend either oral argument or publication.

Statement of the Issues

Was the respondent's constitutional right to a speedy trial violated where: (1) the circuit court ordered the matter to be set for trial; (2) the state did not seek leave to appeal the scheduling order; (3) two months later, at the final pretrial, the state informed the court that it was prepared to proceed to trial; (4) several weeks after that, on the morning of trial, the state informed the court that it had not subpoenaed any witnesses, and it was moving to dismiss the case without prejudice; and (5) the reason given by the state was its belief-- three months after the fact-- that the court's scheduling order was "contrary to public policy."

Answered by the circuit court: Yes. The state deliberately delayed the case in order to hamper the defense, and this factor outweighed all others.

Summary of the Argument

In the constitutional speedy trial analysis, the court is required to consider four factors. However, the court is free to assign greater weight to one or more of the factors as opposed to the others. Here, the state's "reason" for delaying the matter, and then seeking to dismiss the charges on the morning of trial, was because the prosecutor was of the opinion that the circuit court's order scheduling the August 15th case for trial was "contrary to public policy." Significantly, though, the state did not seek leave to appeal the court's scheduling order at the time it was issued, and, at the final pretrial, it told the court that it was prepared to proceed. Weeks later, on the morning of trial, the state only then informed the court that it had subpoenaed no witnesses, and that it would be dismissing the case. In finding a speedy trial violation, the circuit court found that this was a deliberate attempt by the state to hamper the defense, and that this factor outweighed the others and required dismissal with prejudice.

Additionally, the delay in this case includes not only the thirteen months during which the first complaint was pending, but, also, any additional time it would take to resolve a second complaint on the same charges (if the case has not been dismissed with prejudice).

Statement of the Case

As defendant-respondent, Julio Pacheco-Arias (hereinafter "Pacheco-Arias") exercises his option not to present a full statement of the case. § 809.19(3)(a)2. Instead, Pacheco-Arias will present additional facts in the "Argument" section on his brief.

Argument

I. The state's "reason" for the delay is an affront to the circuit court and a deliberate attempt to hamper the defense; and, therefore, this factor must be weighed heavily against the state.

In the constitutional speedy trial analysis, the court is required to consider four factors. However, the court is free to assign greater weight to one or more of the factors as opposed to the others. Here, the state's "reason" for delaying the matter, and then seeking to dismiss the charges on the morning of trial, was because the prosecutor was of the opinion that the circuit court's order scheduling the August 15th case for trial was "contrary to public policy." Significantly, though, the state did not seek leave to appeal the court's scheduling order at the time it was issued, and, at the final pretrial, it told the court that it was prepared to proceed. Weeks later, on the morning of

trial, the state only then informed the court that it had subpoenaed no witnesses, and it would be dismissing the case. In finding a speedy trial violation, the circuit court found that this was a deliberate attempt by the state to hamper the defense, and that this factor outweighed the others and required dismissal with prejudice.

In its brief, the state correctly identifies the four factors that the court must consider in determining whether the defendant has been denied his constitutional right to a speedy trial. The state then dutifully puts the square pegs in the square holes, and the round pegs in the round holes.

What the state refuses to acknowledge, though, is that the court may attach greater weight to one of the factors as opposed to the others. In other words, "[D]ifferent weights should be assigned to different reasons." *Barker v. Wingo,* 407 U.S. 514, 531, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101 (1972).

> A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Barker v. Wingo, 407 U.S. at 531.

Here, on July 27, 2016, the circuit court, the Hon. Michael Hanrahan, presiding, ordered that the August 15th, 2015 case

be set for trial, with the August 1st, 2015 case being set for status on the same date. (R:38-12)[1]

The state did not appeal the circuit court's scheduling order. This was important to the circuit in finding a speedy trial violation. The circuit judge wrote, "Judge Hanrahan's decision contemplated mitigating delays. The State did not appeal the order or request reconsideration or move to dismiss [the] case for recharging. Further, the State represented at the Final Pretrial Conference that it was ready to proceed to trial . . ." (R:25-6). This, the court concluded, demonstrated a "deliberate attempt by the government to delay the trial in order to hamper the defendant," and, therefore, it should heavily weighted against the State in the speedy trial analysis. *Id.*

The circuit court was entirely justified in making such a finding. Here is the prosecutor's "explanation" for dismissing the charges on the morning of trial on October 3, 2016, "It's in the public interest to do so. To do otherwise, Judge, would allow the possibility of Mr. Pacheco-Arias falsely[2] making both

[1] As the record demonstrates, the judge had good reasons for doing so. As defense counsel informed the court, the August 1st charge is virtually indefensible. The August 15th charge, on the other hand, is defensible. If the defendant were to have pleaded guilty to the August 1st charge, then the August 15th case would have had to be dismissed, reissued as a fourth offense, and then wend its way through the system until it came to trial. On the other hand, if the case which is defensible (August 15th) is set for trial, both cases can be resolved in short order regardless of the outcome of the trial. That is, if Pacheco-Arias were acquitted of the August 15th charge, then he could plead guilty to the August 1st case as a misdemeanor. If he were convicted of the August 15th charge, then the August 1st case would be reissued as a felony, and then resolved with a guilty plea.

[2] This would not occur "falsely", it would occur by operation of law

of these misdemeanor allegations when the spirit of the law is that the offense committed within five years of a prior, should he be convicted on the early case, should be handled as a felony." (R:40-6)

In other words, the state was of the opinion that Judge Hanrahan's scheduling order was "contrary to public policy." Rather than seeking leave to appeal the scheduling order, though, the state decided that it would take matters into its own hands. It did not subpoena any witnesses for the jury trial on which, just weeks earlier, the state had informed the court it was ready to proceed. Thus, on October 3, 2016, the circuit court was left with no means to compel the state to proceed to trial.[3]

II. The state's analysis of the length of the delay wholly fails to take into account the additional delay occasioned by dismissing and reissuing the same charges.

The state suggests that delay involved in this case is "thirteen months and is slightly over one year and therefore presumptively prejudicial." (Appellant's brief p. 6)

What the state wholly fails to appreciate, though, is that if the court had allowed the state to dismiss the charges without

[3] Certainly, the judge could have ordered that the case proceed to trial. A jury could have been selected, and, once the jury was sworn, jeopardy would attached. Then, when the state called no witnesses, the court would have been obliged to grant Pacheco-Arias' motion challenging the sufficiency of the evidence at the close of the plaintiff's case. Rather than go through such a farce, though, the judge instead ordered the parties to submit briefs on whether the dismissal should be with prejudice or not.

prejudice, the charges could be reissued *and all of this additional time is counted in the speedy trial analysis*.

In a very real sense, the circuit court's order dismissing the charges with prejudice was a means of protecting Pacheco-Arias from additional delay, rather than as soley a sanction for the thirteen month delay that had already occurred.

Pacheco-Arias's speedy trial rights attached on the day he was arrested for operating under the influence of alcohol (August 15, 2015). *See, State v. Borhegyi*, 222 Wis. 2d 506, 511, 588 N.W.2d 89, 92 (Ct. App. 1998). Thus, the "delay" in this case includes the entire time during which the first complaint was pending (thirteen months), as well as the length of a time a second, reissued complaint pends after dismissal of the first complaint.[4] The total delay, then, can easily exceed two years.

[4] However, the law is not settled on whether any period from the time the first complaint is dismissed until the time the second complaint is issued is included. *State v. Urdahl*, 2005 WI App 191, 286 Wis. 2d 476, 704 N.W.2d 324

Conclusion

For these reasons, the court of appeals should affirm the circuit court's order dismissing the charges with prejudice.

Dated at Milwaukee, Wisconsin, this _____ day of July, 2017.

Law Offices of Jeffrey W. Jensen
Attorneys for Respondent

By:_____
Jeffrey W. Jensen
State Bar No. 01012529

111 E. Wisconsin Avenue
Suite 1925
Milwaukee, WI 53202-4825

414.671.9484

Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 1723 words.

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Dated this _____ day of July, 2017:

_____

Jeffrey W. Jensen