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APPEALS

STATE OF WISCONSIN,	Date: December
	12, 2019
Plaintiff-Respondent,	
v.	District: 3
NHIA LEE,	Appeal No.
Defendant-Appellant.	2019AP000221 CR
	Circuit Court
	Case No.
	2018CF001025

REPLY BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM THE HONORABLE LAMONT JACOBSON
BRANCH III OF THE MARATHON COUNTY CIRCUIT COURT
MARATHON COUNTY CASE NUMBER 2018CF1025

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LEGISLATIVE HISTORY CITED

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ARGUMENT

1. The circuit court lost jurisdiction to determine probable cause at a preliminary hearing since the ten-day time limited allowed under Wis. Stat. § 970.03(2) Wis. Stats had expired.

A. The 10-day time limit for conducting a preliminary examination may not be repeatedly extended.

The rule is a preliminary examination shall be commenced within 10 days if the defendant is in custody and bail has been set at more than \$500. Wis. Stats. § 970.03(2). The exception to the rule allows time limits to be extended upon "stipulation of the parties or on motion and for cause . . .". Wis. Stats. § 970.03(2).

The 10-day statutory time limit required Lee's preliminary examination to be held by September 21, 2018. Lee's preliminary examination was delayed until January 2, 2019. (56:4-16). The plaintiff does not reference whether these delays continue. A 103-day delay in conducting a preliminary hearing is an extraordinary delay. In all probability lengthily delays continue.

The plaintiff's interpretation of the statute

permits the time limits for the preliminary examination to be repeatedly extended for cause without a definite end in sight thereby permitting the exception to swallow the rule. "The interpretation of statutes is a question of law which this court reviews without deference to the decision of the lower court." *State v. Sher*, 149 Wis.2d 1, 8, 437 N.W.2d 878 (1989).

Selders does not support the respondent's argument. Lee's preliminary examination time limits were repeatedly tolled without any definite end in sight. *State v. Selders*, 163 Wis.2d 607, 613, 472 N.W.2d 526. (Ct. App. 1991). The circuit court repeatedly extended the time limits for Lee's preliminary examination without a specific date upon which counsel would be appointed to represent Lee. In ***Selders***, the State sought to adjourn the preliminary examination for cause to conduct a line-up prior to the preliminary hearing. *State v. Selders*, 163 Wis.2d 607, at 613. When the State moved the ***Selders*** Court to adjourn the preliminary examination for cause, the State provided the Court with a date upon which the preliminary examination would actually occur. *Id.* at 613.

"If the plain language of a statute is unambiguous a

court must give it effect and look no further." *State v. Williams*, 198 Wis.2d 516, 544 N.W.2d 406, 410 (1996) (*citations omitted*). "If ambiguity is found, a court should examine the scope, history, context, subject matter, and object of the statute in order to divine legislative intent. *Id.* at 410 (*citations omitted*). "Ambiguity occurs when reasonably well-informed persons can understand a statute in more than one way." *Id.* at 410 (*citations omitted*).

The repeated delays in conducting the preliminary examination frustrate the legislative intent for the time limits. The preliminary examination time limits were created as a legislative mechanism to protect Lee's constitutional right to speedy trial, and are therefore really a constitutional rule which should create a higher barrier to the circuit court finding good cause extend the time limits. Wis. Stats. Ann. 970.03(2), 1969 AB 603 Ch. 255, Laws of 1969, at 604. (Prefatory note of Chapter 255, Laws of 1969);

<http://docs.legis.wisconsin.gov/1969/related/acts/255.pdf>

electronic page 3. (App. 128.) (Lee's argument referred to the Criminal Rules Committee established by the

Judicial Council in 1967 as referenced in the prefatory note of Chapter 255, Laws of 1969. (Lee's Br. 24) Wis. Stats. Ann. 970.03(2) 1969 AB 603, Ch. 225, Laws of 1969, 602-604,

<http://docs.legis.wisconsin.gov/1969/related/acts/255.pdf>

electronic page 1-3. (App. 128)

The legislature included preliminary hearing time limits to encourage speedy trials. Wis. Stats. Ann. 970.03(2) 1969 AB 603, Ch. 225, Laws of 1969, at 604,

<http://docs.legis.wisconsin.gov/1969/related/acts/255.pdf>

electronic page 3. (App. 128)

"In an attempt to speed up the criminal justice procedures, provisions for a speedy trial set out at length the time in which a preliminary examination must be commenced (20 days after initial appearance), the time for filing an information (30 days after the preliminary examination or waiver thereof) and provisions for the commencement of felony and misdemeanor trials." Wis. Stats. Ann. 970.03(2) 1969 AB 603, Ch. 225, Laws of 1969, at 604,

<http://docs.legis.wisconsin.gov/1969/related/acts/255.pdf>

electronic page 3. (App. 128); *See also*, p. 637,
electronic p. 36 (containing identical text for §
970.03(2) Wis. Stats.

**B. The circuit court erred by repeatedly extending the
10-day time limit for cause without a definite end.**

The court erred by repeatedly tolling the 10-day time limits without knowing when, if ever, counsel would be located and appointed. Repeatedly tolling the preliminary hearing time limits without an end in sight creates a slippery slope that nullifies the primary purpose of the preliminary examination.

"[T]he primary purpose of a preliminary examination is 'to protect the accused from hasty, improvident, or malicious prosecution and to discover whether there is a substantial basis for bringing the prosecution and further denying the accused his right to liberty.'" *Bailey v. State*, 65 Wis.2d 331, 344, 222 N.W.2d 871 (1974).

"Requiring a finding of probable cause protects the defendant's due process rights and guards against undue deprivations of the defendant's liberty." *State v. Richer*, 174 Wis.2d 231, 240, 496 N.W.2d 66 (1993).

"This court has repeatedly held that the purpose of the preliminary hearing includes protections beyond those expressed in the statutory language . . ." *Id.* at 240. "The object of the preliminary investigation is to prevent hasty, malicious, improvident, and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, and to save the defendant from the humiliation and anxiety involved in public prosecution, and to discover whether or not there are substantial grounds upon which a prosecution may be based." *Id.* 240-241, (citing *Thies v. State*, 178 Wis. 98, 103, 189 N.W. 539 (1922)).

Lee's oppressive pretrial incarceration without counsel violated the Sixth Amendment speedy trial provision. Lee remained without counsel from September 11, 2018, until December 21, 2018. (41)(17). Due to the failure to appoint counsel, Lee's case did not move forward until the preliminary hearing was held on January 2, 2019. (56).

The Sixth Amendment's speedy trial provision is "an important safeguard to prevent undue and oppressive

incarceration prior to trial, to minimize anxiety and concern accompany public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." *United States v. Marion*, 404 U.S. 307, 320 (1971).

2. The Court erred by failing to appoint counsel for Lee at county expense when the Public Defender was unable to find counsel to represent Lee.

"A statute should be construed so as to avoid absurd results." *State v. Peete*, 185 Wis.2d 4, 17, 517 N.W.2d 149(1994). To interpret a statute with a 10-day time limit for conducting preliminary examinations so as to permit a 103-day delay in conducting a preliminary examination creates an absurd result.

"[A]n indefinite adjournment of a preliminary examination because of illness of the judge was a violation of the statute." *State ex rel. Klinkiewicz v. Duffy*, 35 Wis.2d 369, 373, 151 N.W.2d 63,66 (1967).

The Wisconsin Supreme Court held that if "lawyers are unavailable or unwilling to represent indigent clients at the SPD rate of \$40/hour, as is

increasingly the case, then judges must appoint a lawyer under SCR 81.02, at county expense.” *In re the Petition to Amend SCR 81.02*, S. Ct. Order 17-06, 2018 WI 83, at 15.

The Supreme Court directive used the word “must” to order that courts’ shall appoint an attorney when *the public defender is unable to locate counsel for an indigent defendant. Id.*

The circuit court erred by failing to appoint counsel for Lee when the public defender was unable to locate counsel for him. The circuit court erred by failing to order the SPD to appoint counsel for Lee by a designated date.

The circuit court erred by finding good cause to repeatedly extend the time limits because the SPD was searching for counsel for Lee because it permitted the time limits to be extended without a definite end in sight. Indigent defendants in custody waiting for counsel to be appointed were deprived of their right to counsel, and the deprivation resulted in severe restrictions on their liberty and other constitutional

interests. *Lavallee & Others v. Justices in the Hampden Superior Court & Others*, 442 Mass. 228, 232, 812 N.E. 2d 895 (2004). The defendants argued that the failure to ensure that counsel was appointed at a first appearance, or promptly thereafter, irreparably damaged the petitioners' substantive right to the assistance of counsel." *Id.* at 234. Lee waited more than three months for counsel to be appointed by the SPD therefore his substantive right to the assistance of counsel was irreparably damaged.

Counsel's responsibilities include interviewing the defendant and witnesses while events are fresh in the memories, preserving physical evidence that may be important to the defense, and locating potential defense witnesses. *Id.* at 235. "The effects of the passage of time on memory or the preservation of evidence are so familiar that the importance of prompt pretrial cannot be overstated." *Id.* at 235.

The Lavallee Court ruled that upon a showing that counsel was not available to represent an indigent defendant, the defendant may not be held in custody

for more than seven days and the criminal case may not continue beyond forty-five days. *Id.* at 232.

The right to counsel attached at Lee's initial appearance. *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 128 S.Ct. 2578, 2584 (2008). "We therefore must address the ongoing harm to indigent criminal defendants who are still deprived of counsel. The duty to provide such counsel falls squarely on the government, and the burden of a systemic lapse is not to be borne by defendants." *Lavallee & others v. Justices in the Hampden Superior Court & Others*, 442 Mass. 228, 246, 812 N.E. 2d 895. Lee waited more than three months for counsel to be appointed and for a preliminary hearing to be held. (17) (56). The delay was due to chronic underfunding which resulted in a shortage of attorneys. (57:13; App. 104).

3. Lee's confinement in custody with process deferred for over three months violated due process.

The Fifth Circuit hold that excessive pre-trial detention which deprived an individual of liberty without due process violated the Fourteenth Amendment. *Jauch v. Choctaw County*, 874 F.3d 425 (5th Cir., 2017)

(cert. denied). Jauch was indicted by a grand jury, arrested, and incarcerated in jail where she waited 96 days for her case to move forward when she was appointed counsel, brought before a judge, and had bail set. *Id.* at 428. Lee was incarcerated in jail where he waited for three months for his case to move forward when counsel was finally appointed and a preliminary examination was held. (41)(56).

The Fourteenth Amendment forbids states from "depriv[ing] any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV. "The touchstone of due process is protection of the individual against arbitrary action of government." *Jauch v. Choctaw Cty.*,⁸⁷ 4 F.3d 425, 430 (*citations omitted*). The New York Supreme Court found defendants suffered irreparable constitutional harm when they were denied their right to counsel, because they were unrepresented during critical periods of their proceedings where their due process and liberty rights were at stake and assigned counsel was not available to represent them, so they endured long delays. *LAWYERS' ASSN. v. State of NY*, 196 Misc.2d 761, 784, 763 N.Y.S.2d 397 (N.Y. Sup. Ct. 2003).

Conclusion

Lee's case is unusual in that his rights under a state statute limiting time for conducting a preliminary examination, due process, speedy trial and right to counsel are all implicated. As indicated above the rights deprived are irreparable and therefore the delay is prejudicial.

The respondent has not provided any real answers to the results reached in *Jauch*, *Lavallee*, and *Rothgery*. *Jauch v. Choctaw County*, 874 F.3d 425; *Lavallee & others v. Justices in the Hampden Superior Court & Others*, 442 Mass. 228, 232, 812 N.E. 2d 895; *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 128 S.Ct. 2578, 2584.

The respondent avoids the systemic state-wide problems due to the shortage of attorneys taking SPD cases and has not provided any intelligible response to the mandate by of court appointment of counsel. *In re the Petition to Amend SCR 81.02*, S. Ct. Order No. 17-06, 2018 WI 83, P. 15. (issued June 27, 2018, eff. Jan. 1, 2020).

The three-month delay in appointing counsel and conducting the preliminary examination caused Lee irreparable harm. He seeks dismissal with prejudice. *Lavallee & others v. Justices in the Hampden Superior Court & Others*, 442 Mass. 228, 232, 812 N.E. 2d 895; *Jauch v. Choctaw County*, 874 F.3d 425.

Lee also asks this court to direct courts to appoint attorneys for indigent defendants as required by Dean and the Petition. *State v. Dean*, 163 Wis. 2d 503, 471 N.W.2d 310; *In re the Petition to Amend SCR 81.02*, S. Ct. Order No. 17-06, 2018 WI 83, P. 15. (issued June 27, 2018, eff. Jan. 1, 2020).

Dated May 28, 2020.

Respectfully submitted,

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CERTIFICATION AS TO FORMAT/LENGTH

I hereby certify that this reply brief conforms to the form and length rules contained in Wis. Stat. § 809.19(8) (b) and (c) in that it is: Monospaced font, 10 characters per inch, double-spaced, a 1.5 inch margin on the left side and a one-inch margin on all other sides. The length of the reply brief is 13 pages, or 2,209 words.

Dated May 28, 2020.

Electronically Signed by: Attorney Julianne M. Lennon
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**CERTIFICATION OF COMPLIANCE WITH RULE § 809.19(12) (f) and
(13) (f)**

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wisconsin Supreme Court Order 19-02: Interim Rule Governing Electronic Filing in the Court of Appeals and the Supreme Court.

Dated May 28, 2020.

Electronically Signed by: Attorney Julianne M. Lennon
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