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SUPREME COURT

STATE OF WISCONSIN
SUPREME COURT OF WISCONSIN
Case No. 2019AP221-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,
v.

NHIA LEE,

Defendant-Appellant-Petitioner.

APPEAL FROM A NON-FINAL ORDER DENYING A MOTION TO DISMISS
ENTERED IN THE MARATHON COUNTY CIRCUIT COURT, THE HONORABLE
LAMONT K. JACOBONSON, PRESIDING

DEFENDANT-APPELLANT-PETITIONER'S REPLY BRIEF

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In re the Petition to Amend SCR 81.02,
 S. Ct. Order 17-06, 2018 WI 83,
 (issued June 27, 2018, eff. Jan. 1, 2020) 2, 13

1. Circuit courts should be required to appoint counsel at county expense when there are delays in securing SPD-appointed counsel for defendants.

This Court should order trial courts to appoint counsel at county expense for indigent defendants when there are delays in securing SPD-appointed counsel.

The Court of Appeals ruled that the trial court could sua sponte extend the time limits for the preliminary hearing. *State v. Lee*, 2021 WI App 12, ¶ 39, 396 Wis.2d 136, 955 N.W.2d 424 (Ct. App. 2021). The Court of Appeals found that difficulty locating counsel for an indigent defendant can be a valid reason for extending the time limits for the preliminary hearing. *Id.* at ¶ 51, 396 Wis.2d 136, 955 N.W.2d 424. Nhia Lee asks this Court to order circuit courts to appoint counsel instead of delaying preliminary hearings.

An indigent defendant should be appointed counsel at the initial appearance unless intelligently waived. *Jones v. State*, 37 Wis.2d 56, 69, 154 N.W.2d 278 (1967). The failure to appoint counsel for Lee at the initial appearance violated the rule announced in *Jones*. *Id.* at 69.

After receiving extensive public comment, this 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 Court of Appeals deferred to this Court to determine whether the petition language should be construed as a mandatory directive to circuit courts to appoint counsel at county expense when there are delays in securing SPD-appointed counsel. *State v. Lee*, 2021 WI App 12, ¶ 37, 396 Wis.2d 136, 955 N.W.2d 424.

Counsel for an indigent defendant should be appointed early in the criminal proceedings to fulfill the guarantee of the Sixth Amendment. A defendant's initial appearance initiates adversarial judicial proceedings that trigger attachment of the Sixth Amendment right to counsel. *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 128 S.Ct. 2578, 2592 (2008). Once the right to counsel has attached, the state has an "obligation to appoint counsel within a reasonable time once a request for assistance is

made.” *Id.* 2591. The delay in the appointment of counsel for Lee from September 11, 2018, until December 21, 2018, was unreasonable. (41)(17).

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 allows time limits to be extended upon “stipulation of the parties or on motion and for cause . . .”. Wis. Stats. § 970.03(2).

“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). Interpreting the statute to permit the time limits for the preliminary examination to be repeatedly extended for cause without a definite end in sight permits the exception to swallow the rule.

Prior cases appear to be based on a single adjournment of the preliminary hearing beyond the time limits. *Logan v. State*, 43 Wis.2d 128,137, 168 N.W.2d 171 (1969); *State v. Klinkiewicz v. Duffy*, 35 Wis.2d 369, 374, 151 N.W.2d 63 (1967).

Repeatedly adjourning a preliminary hearing beyond the time limits frustrates the primary purpose of the statute. "The purpose of the preliminary examination is to provide an *expeditious* means for the discharge of an accused if it does not appear probable that he has committed the crime or crimes for which he is being held." *State v. Klinkiewicz v. Duffy*, 35 Wis.2d 369, 373, 151 N.W.2d 63.

"[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).

Stoeckle ruling was based upon the fact that there was not a precise number of days for a trial to begin. *State v. Stoeckle*, 41 Wis. 2d 378, 386-387, 164 N.W.2d 203 (1969).

When the code was redrafted to include the current

version of the preliminary hearing statute, the revision included time limits for misdemeanor and felony 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>)

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2. Lee's right to counsel was denied.

Lee's right to counsel was denied because he was an indigent defendant and counsel was not appointed at the initial appearance. *Jones v. State*, 37 Wis.2d 56, 69a, 154 N.W.2d 278.

"The most compelling reason for appointing counsel at the initial appearance is that counsel's presence undeniably aids the fact finding, guilt-determining ends of our criminal justice system. Counsel will be better able to locate possible alibi witnesses and preserve their testimony. The earlier appointment will afford an accused a better opportunity to effectively prepare his defense not only at the preliminary but also at the trial itself."

Jones v. State, 37 Wis.2d 56, 69a, 154 N.W.2d 278.

"The rule enunciated here establishes the precise point "prior to" a preliminary examination when an accused is entitled to counsel." *Id.* at 69a.

Court Commissioner Bauman told Lee, "What we've been

doing is finding good cause based upon the need to have a lawyer, and the State has a shortage of Public Defender attorneys that are, you know, taking cases." (46:3). At some point the court may have to appoint an attorney at county expense but "they're trying not to have to do that." (53:4).

The Court of Appeals declined to rule on Lee's constitutional claim that his right to counsel was denied. "The doctrine of constitutional avoidance counsels against our addressing constitutional issues if there is a sufficient statutory basis to decide the case." *State v. Lee*, 2021 WI App 12, ¶ 62, 396 Wis.2d 136, 955 N.W.2d 424.

"Counsel for an indigent defendant must be appointed at the time of his initial appearance before a magistrate:" *Martin v. State*, 48 Wis.2d 604, 607 180 N.W.2d 552 (1970) (*citations omitted*).

This Court intended that the rule requiring earlier appointment of counsel would resolve lengthy time lags between initial appearances in court and appointment of counsel. *Kaczmarek v. State*, 38 Wis.2d 71, 155 N.W.2d 813 (1968). Lee's case demonstrates that long delays between

the initial appearance and the appointment of counsel continue.

3. Lee was denied due process.

Lee was denied due process because his preliminary hearing was delayed indefinitely further depriving him of his liberty without the court making a finding that there was probable cause to believe that a felony was committed and that Lee committed it.

Probable cause findings based upon the criminal complaint comply with *Gerstein* and *Riverside* but they are not the equivalent of a preliminary hearing. *Gerstein v. Pugh*, 420 U.S. 103, 114, 95 S.Ct. 854, 863, 43 L.Ed.3d 54 (1975); *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991); § 970.03(2) Wis. Stats.

"The purpose of the preliminary examination is to provide an *expeditious* means for the discharge of an accused if it does not appear probable that he has committed the crime or crimes for which he is being held." *State v. Klinkiewicz v. Duffy*, 35 Wis.2d 369, 373, 151 N.W.2d 63. Lee's preliminary hearing was not conducted in an expeditious manner.

"The underlying purpose of the examination is to determine whether the defendant should be subjected to criminal prosecution and further deprived of his liberty." *State v. Dunn*, 121 Wis.2d 389, 394-395, 359 N.W.2d 151 (1984). The delays further deprived Lee of his liberty in violation of the purpose of the preliminary hearing statute.

In criminal cases, the power of the state to deprive a person of the fundamental liberty is derived the police power. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1084 (1972). "This power is tempered with stringent procedural safeguards designed to protect the rights of one accused of a crime" *Id.*

Other jurisdictions have taken action to protect indigent defendants. "In view of the importance of prompt pretrial investigation and preparation, and the serious likelihood that without the assistance of counsel, decisions that are themselves critical stages are being made, the petitioners are currently deprived of counsel to an extent that raises serious concerns about whether they will ultimately receive effective assistance of trial counsel." *Lavallee v.*

Hampden Superior Court, 442 Mass. 228, 236, 812 N.E. 2d 895. (2004).

4. Lee's right to a speedy trial was denied

Lee's right to a speedy trial was denied because the preliminary hearing time limits were part of a revision of the criminal procedure codes which included time limits to protect his right to a speedy trial. The remedy for a speedy trial violation is dismissal with prejudice. *State v. Lock*, 2013 WI App 80, ¶ 21, 348 Wis.2d 334, 833 N.W.2d 189, 196 (Ct. App. 2013).

The legislative history of the preliminary statute establishes that the legislature never contemplated a delay of several months between the initial appearance and the preliminary hearing. Wis. Stats. Ann. 970.03(2), 1969 AB 603, Ch. 225, Laws of 1969, at 602-604.

<http://docs.legis.wisconsin.gov/1969/related/acts/255.pdf>)
electronic page 3.

The 20-day limit for preliminary examinations created by the act was part of general effort to encourage speedy trials. *Id.* at 604.

"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. Felony trials shall commence within 90 days from the date trial is demanded by either the state or the defendant. This is a new provision recognizing the right and interest of the state in obtaining a speedy trial. Misdemeanor actions must commence within 60 days from the date of the defendant's initial appearance in court."

Id. at 604.

In evaluating whether a defendant's speedy trial right has been denied, the Court engages in a balancing test. *Day v. State*, 61 Wis.236, 244, 212, N.W.2d 489 (1973). The first factor is the length of delay. The *Day Court* declined to adopt a specific time period for the length of delay as a condition precedent to the application of the balancing test. *Id.* at 245.

The second factor is the reason for the delay. *Id.* at 245. "The SPD appoints cases to SPD staff attorneys and private attorneys. Wis. Stat. §§ 977.05(4)(i)&(5)(a), 977.08(3)(d). The SPD is funded by the state, and therefore, pay for staff and private attorneys is primarily allocated through the state budget process." (SPD Br. 2). The legislature's inadequate funding of the SPD caused the delay in the appointment of counsel for Lee, therefore, the

delay should weigh against the State.

The final factor is prejudice to the defendant. *Day v. State*, 61 Wis. 236, 246. Prejudice to the defendant should be assessed in light of the interests the right was designed to protect: 1) to prevent oppressive pretrial incarceration; 2) to minimize the defendant's anxiety and concern; and 3) to limit the possibility that the defense will be impaired. *Id.* at 246.

The protracted delay in the appointment of counsel prejudiced Lee because it impeded counsel's ability to promptly investigate his case thereby raising serious concerns about whether he will ultimately receive effective assistance of trial counsel.

"Defense counsel's investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter, consequences of the criminal proceedings, and potential dispositions and penalties."

American Bar Association, Fourth Ed. (2017) of the Criminal Justice Standards for the Defense Function, Part IV: Investigation and Preparation, Standard 4-4.1 Duty to Investigate and Engage Investigators.

https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/.

Lee is not required to show actual prejudice to establish a speedy trial violation. *State v. Leighton*, 2000 WI App 156, ¶ 25, 237 Wis.2d 709, 616 N.W.2d 126 (2000).

5. If the circuit court lost jurisdiction to determine probable cause at a preliminary hearing because the ten-day time limit under Wis. Stat. § 970.03(2) had expired by 104 days, what is the appropriate remedy?

The circuit court lost competency to proceed therefore the case must be dismissed. Failure to follow statutory mandates prevents a court from adjudicating the specific case before it due to loss of competence. *In the Interest of B.J.N.*, 162 Wis.2d 635, 655-656; 469 N.W.2d 845, 853 (1991). A court's loss of power due to the failure to act within statutory time periods cannot be stipulated or waived. *In the Interest of B.J.N.*, 162 Wis.2d 635, 657; 469 N.W.2d 845, 854.

Conclusion

Lee's rights under the preliminary hearing implicate due process, speedy trial and right to counsel. The rights deprived are irreparable therefore the delay

Prejudicial.

The constitutional crisis caused by the systemic state-wide shortage of attorneys taking SPD cases can no longer be avoided. Lee requests dismissal with prejudice. It is essential that the legislature properly fund the Office of the State Public Defender. It is imperative that circuit court's appoint counsel for indigent defendants instead of indefinitely delaying criminal proceedings. Lee also requests that this Court direct trial courts to appoint counsel for indigent defendants when the SPD is unable to secure 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). *State v. Dean*, 163 Wis. 2d 503, 471 N.W.2d 310 (Ct. App. 1991).

Dated July 21, 2020.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stats. § (Rule) 809.19(8)(b), (c) for a brief produced with monospaced font. The length of the reply brief is thirteen pages.

Dated July 21, 2021.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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.

Dated July 21, 2021.

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