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CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

Case No. 2020AP2072

ALEC ALFORD,

Defendant-Respondent.

APPEAL FROM A FINAL ORDER GRANTING
DISMISSAL, ENTERED IN THE WAUKESHA COUNTY
CIRCUIT COURT, THE HONORABLE
J. ARTHUR MELVIN III, PRESIDING

BRIEF OF DEFENDANT-RESPONDENT

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Statutes Cited:

§939.50(3)(f), Wis. Stats.	1
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Other Authorities Cited:

Clark, <i>The Effect of the Interstate Agreement on Detainers on Subject Matter Jurisdiction</i> , 54 Fordham L. Rev. 109 (1986).	8
Council of State Governments, <i>Handbook on Interstate Crime Control</i> 134 (1978).	9

ISSUES PRESENTED

1. Did Judge Lazar Properly Dismiss Waukesha County Case No. 19-CF-597 With Prejudice, Due to the State's Failure to Comply With §971.11(2), Wis. Stats.?

This Court Should Affirm.

- B. Did Judge Melvin Properly Dismiss Waukesha County Case No. 20-CM-1192 Because the Earlier Case Had Been Dismissed With Prejudice?

This Court Should Affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendant-respondent does not request oral argument, but does request publication because it would resolve an issue of importance and previously not addressed by the courts of this State regarding the proper remedy for a violation of §971.11(2), Wis. Stats., which results in a dismissal with prejudice.

STATEMENT OF CASE AND FACTS

In a Criminal Complaint, dated March 18, 2019, Alec Alford (Alford) was charged with Delivering Cocaine as a Second or Subsequent Offense in violation of Wisconsin Statutes 939.50(3)(f), 961.41 (1)(cm)1r and 961.48(1)(b). It was alleged he delivered cocaine to a confidential informant on March 14, 2018, at an Aldi's grocery store, located in Waukesha County (R.28).

He was incarcerated at the Milwaukee Secure Detention Facility when he made a request for prompt disposition, pursuant to §971.11, Wis. Stats.,¹ of the above-referenced case on June 4, 2019 (R.29).

Subsequently, Waukesha County Deputy District Attorney Leslie Boese informed Waukesha County Circuit Court Judge Lazar of that request in a letter dated, June 13, 2019 (R.30)

Alford's case was not resolved in 120 days as required by statute and, thus, the charge against him had to be dismissed. The only question which remained was whether that dismissal should be with or without prejudice. On January 6, 2020, Alford filed a brief with the circuit court arguing his

¹ Also known as the Intrastate Detainer Act.

case should be dismissed with prejudice, citing State v. Davis, 2001 WI 136, 248 Wis.2d 986, 637 N.W.2d 62 (R.31).

Specifically, he argued the factors identified in *Davis* required dismissal with prejudice because:

1. The State merely notified the circuit court of Alford's request and failed to follow through on its statutory obligation to ensure Alford's request was timely met.
2. The nature of the charge against Alford was not so complicated or unusual as to prevent adequate preparation for trial in 120 days.
3. Alford did not contribute to the delay of the proceedings.
4. Alford did not waive his statutory right to a prompt disposition either explicitly or implicitly.
5. Alford was harmed by the delay due to (a) the effect it had on his legal defenses (b) his inability to participate in programming and possible movement within his institution; (c) the effect it had on the orderly rehabilitation process within the Department of Corrections; (d) the effect it had on his possibility for a concurrent sentence; (e) the effect it had on his possible transfer to a less secure facility; (f) the effect it had on his opportunity for parole; (g) the effect it had on his possible transfer to another institution; (h) the effect it had on the public's interest in the prompt prosecution of crime; and (l) the lack of any harm a dismissal might have on a victim.

(R.31).

On June 9, 2020, Judge Lazar conducted a hearing at which she ordered Alford's case be dismissed with prejudice. In so doing, she found the *Davis* factors weighed in favor of

dismissing with prejudice. Specifically, she found:

1. It was the State's obligation to follow through to ensure Alford's statutory right to a prompt disposition was fulfilled and the State failed to do so (R.32, pp. 4-5).
2. The nature of the charge against Alford was not of such a nature as to require extensive preparation for trial (Id., p. 5).
3. Alford's conduct did not contribute to the delay (Id., p.5).
4. Alford did not waive the time limit (Id., p. 5).
5. There was harm to Alford from the delay due to (a) his inability to participate in programming and movement within the institution; (b) the effect it had on his rehabilitation; (c) the effect it had on his possibility for concurrent sentences; and (d) the effect it had on his possibility for parole (Id., pp. 5-7, 11).

In a Criminal Complaint filed on July 9, 2020, the State filed new charges against Alford in Waukesha County Case No. 20-CM-1192 (R.1). Relying on the same set of facts from the 2018 case which was dismissed with prejudice, the State charged Alford with five counts of Possession of Drug Paraphernalia as a Repeater, in violation of §§939.62(1)(a) and 961.573(1) Wis. Stats.

On September 15, and October 10, 2020, Alford filed motions to dismiss the new case, arguing the "multiplicitous charges" violated his constitutional rights not to be put in jeopardy twice for the same criminal conduct and due process

(R.8;15). In a letter dated October 15, 2020, the State argued there was no violation of Alford's right not to be put in jeopardy twice for the same conduct because the circuit court's dismissal of the prior case with prejudice did not constitute either an acquittal or conviction and, thus, jeopardy did not attach in that case (R.16).

In a hearing conducted on October 29, 2020, Waukesha Circuit Court Judge Melvin summarized the respective arguments of the parties and found the defense was arguing a violation of §971.71, Wis. Stats. (multiplicitous charges) and constitutional violation, while the State was arguing there was no double jeopardy issue (R.24, pp. 4-5). The court stated the arguments of the parties were interesting, "but appear that the parties are talking past each other" (Id., p. 5). The court found the real issue was the definition of dismissal with prejudice when the same facts are the basis for a subsequent prosecution (Id.). The court then found the State could not rely on those same facts in the instant case and granted the defense motion to dismiss the case (Id., pp. 5-7).

The State filed a Notice of Appeal on December 14, 2020 (R.18). The record was compiled and transmitted to this Court on January 26, 2021 (R.27). The State filed its brief-in-chief and appendix on March 15, 2021.

Subsequently, the Wisconsin State Public Defender, Appellate Division, appointed undersigned counsel to represent Alford on appeal.

Undersigned counsel filed a motion to supplement the record with documents from the trial court record in Waukesha County Case No. 19-CF-597 and, in an order dated October 27, 2021, this Court granted the motion to supplement the record. The supplemented record was electronically filed on November 17, 2021, which made Alford's response brief due for filing on December 16, 2021. However, this Court extended the time for undersigned counsel to file the response brief until December 30, 2021,

ARGUMENT

- I. A CIRCUIT COURT'S DISMISSAL WITH PREJUDICE FOR A VIOLATION OF §971.11(2), WIS. STATS., PRECLUDES THE STATE FROM FILING NEW CHARGES BASED UPON THE SAME CONDUCT.**
- A. Judge Lazar Properly Dismissed Waukesha County Case No. 19-CF-597 With Prejudice, Due to the State's Failure to Comply With §971.11(2), Wis. Stats.**

In State v. Davis, 2001 WI 136, 248 Wis.2d 986, 637 N.W.2d 62, the Wisconsin Supreme Court determined a circuit court must dismiss a criminal action for the State's failure to comply with the mandate of §971.11(2), Wis. Stats., but has the

discretion to dismiss either with or without prejudice. Davis, ¶¶27. In so ruling, the court addressed the legislative purpose in enacting the statute governing the disposition of intrastate detainers. The court reasoned the legislature intended to prevent (a) “the potential injustices resulting from the practice of filing detainers;” (b) to give an inmate “a greater degree of knowledge about his [or her] future so that he [or she] could begin more constructive planning and co-operate on a treatment program with the knowledge his [or her] efforts would not be minimized by the threat of unsatisfied charges;” (c) “to provide the operation of a speedier disposition for inmates than others charged with crimes;” and (d) “to prevent the State from repeatedly dismissing and refileing a criminal case after a dismissal without prejudice.” Id., ¶¶15. See also Carchman v. Nash, 473 U.S. 716, 720-21 (1985).

The *Davis* court outlined the factors the circuit court should consider in determining whether to dismiss with or without prejudice, including:

1. The reasons for the length of the delay in bringing the case to trial.
2. The nature of the case and whether it is unreasonable to expect adequate preparation within the statutory time limit.
3. The accused’s conduct in contributing to the delay.

4. The accused's waiver of the right to a prompt disposition of the case.
5. The harm to the accused resulting from the delay, including anxiety and concern.
6. The effect of the delay on the accused's legal defenses.
7. The effect of the delay on programs and movement within the institutions available to the accused.
8. The effect of the delay on the orderly rehabilitation process of an accused within the Department of Corrections.
9. The effect of the delay on the accused's concurrent sentencing possibilities.
10. The effect of the delay on an accused's possible transfer to a less secure facility.
11. The effect of the delay on the accused's parole possibilities.
12. The effect of the delay on the transfer of the accused to another institution.
13. The effect of the delay and dismissal on the public interest in the prompt prosecution of crime.
14. The effect of the delay and dismissal on the victim.

Davis, ¶29.

In the instant case, Judge Lazar considered all of the above factors and found most of them weighed in favor of a dismissal with prejudice. Accordingly, her decision to dismiss Alford's case with prejudice constituted a proper exercise of

discretion.

B. Judge Melvin Properly Dismissed Waukesha County Case No. 20-CM-1192 Because the Earlier Case Had Been Dismissed With Prejudice.

This case requires this Court to interpret §971.11(2), Wis. Stats., which is a question of law and which this Court reviews *de novo*. Davis, ¶¶3-4.

The Council of State Governments proposed legislation regarding both intrastate and interstate detainers lodged against prisoners in 1956. Clark, *The Effect of the Interstate Agreement on Detainers on Subject Matter Jurisdiction*, 54 Fordham L. Rev. 109 (1986). These were referred to by the drafters as the Uniform Mandatory Disposition of Detainers Act (UMDDA), which governed intrastate detainers, and the Interstate Agreement on Detainers (IAD).

In allowing states to enact legislation regarding intrastate detainers and to enter into interstate agreements with one another in which failure to comply may result in a dismissal of a criminal charge with prejudice, the United States Congress described the sanction of dismissal with prejudice as having the effect of “bar[ring] any future prosecution against the defendant for charges of arising out of the same conduct.” Id., p. 1218, n. 47; *See also* 18 U.S.C. app. §2, arts. III(d),

IV(e) and V(c) (1982). This view is consistent with the Council's intent in proposing the laws regarding both intrastate and interstate detainers and the sanctions for failing to expeditiously resolve them. Council of State Governments, Handbook in Interstate Crime Control 134 (1978) (because legislation regarding intrastate and interstate detainers is remedial in nature it should be construed liberally in favor of the prisoner). See *a/so U.S. v. Mauro*, 436 U.S. 340 (1978) (no reason to give an unduly restrictive or miserly meaning to the language of legislation regarding intrastate or interstate detainers).

In the instant case, Judge Melvin found neither the State nor the defense were correct in assessing the correct outcome of the motion to dismiss the new case was governed by the principles of multiplicity or double jeopardy; but rather, should hinge upon the definition of "with prejudice." His reasoning was in keeping with that of Congress in defining the meaning of the sanction of dismissing with prejudice for failing to resolve both intrastate and interstate detainers in a timely fashion. Additionally, Judge Melvin gave the factors for determining whether to dismiss a case with prejudice outlined in *Davis* their fair due. If the State is able to re-charge a defendant with new charges, via different statutes, based upon

the same conduct then the sanction of dismissal with prejudice has no true impact or meaning to a defendant harmed by the State's failure to comply with §971.11(2), Wis. Stats. Judge Melvin based his decision to dismiss the new case against Alford on a reasoned interpretation of §971.11(2), Wis. Stats., and, thus, should be affirmed.

CONCLUSION

For all the reasons stated above, this Court should affirm the circuit court's ruling dismissing Waukesha County Case No. 20-CM-1192.

Dated at Wauwatosa, Wisconsin, this 29 day of December, 2021.

Respectfully submitted,

REBHOLZ & AUBERRY

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CERTIFICATION

I certify this Brief conforms to the rules contained in §§809.19(8)(b) and (c), Stats., for a Brief prepared using the following font:

Proportional sans serif font: 12 characters per inch, double spaced; 2.0 margins on the left and right sides and 1 inch margins on the other two sides. The length of this Brief is 2029 words.

Dated: December 29, 2021

Electronically signed by:

Attorney Ann Auberry

E-FILE/SERVICE CERTIFICATION

I certify that in compliance with Wis. Stat. §801.18(6), I electronically filed this brief, along with the appendix, with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated: December 29, 2021

Electronically signed by:

Attorney Ann Auberry