STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

NO. 2021AP000177 - CR

STATE OF WISCONSIN,

***Plaintiff-Respondent*,**

vs.

CHRISTOPHER S. BUTLER

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

Permissive Appeal from Order Denying Motion to Dismiss
Brown County Circuit Court,
Hon. Beau G. Liegeois, presiding
Case No. 19CF1630

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STATEMENT OF THE ISSUES PRESENTED

1. Are there any due process or other limitations on whether, under what circumstances, or how long an initial appearance can be adjourned? The circuit court did not decide this issue, but the Court of Appeals has directed the parties to address this issue in their briefs.
2. Does the 10-day deadline in Wis. Stat. § 970.03(2) for holding a preliminary hearing begin to run when a defendant first appears before

the court or when the initial appearance is concluded? The circuit court did not decide this issue, but the Court of Appeals has directed the parties to address this issue in their briefs.

3. How does *Lee* apply in the context of an initial appearance that has been adjourned multiple times? The circuit court did not decide this issue, but the Court of Appeals has directed the parties to address this issue in their briefs.
4. Did the circuit court lose personal jurisdiction over Butler as a result of the continued extensions of time for the convening of his preliminary hearing as he awaited the appointment of assigned counsel? The circuit court decided that it did not lose personal jurisdiction over Butler.

ARGUMENT

I. Butler did not forfeit the violation of section 970.03(2) by not objecting to the Court's jurisdiction at his completed initial appearance, preliminary examination, or arraignment, and by entering not guilty pleas to the charges.

The State claims that Butler forfeited his right to now assert a claim as to a loss of personal jurisdiction because he failed to object to the Court's jurisdiction at his completed initial appearance, his preliminary examination, and his arraignment. The State further argues that Butler also forfeited that defense by entering pleas to the charges. (State's Br. 25-26).

In support of its argument, the State cites *State v. Asmus*, 2010 WI App 48, ¶ 4, 324 Wis. 2d 427, 782 N.W.2d 435; *Armstrong v. State*, 55 Wis 2d 282, 285-86, 198 N.W.2d 357 (1972); and *Godard v. State*, 55 Wis. 2d 189, 190, 197 N.W.2d 811 (1972). In each of those cases, however, after raising a potential lack of personal jurisdiction claim, the defendant in each entered a *guilty* plea, whereas Butler has maintained his *not guilty* pleas. *Asmus*, 2010 WI App 48, ¶ 2; *Armstrong v. State*, 55 Wis 2d at 284; and *Godard v. State*, 55 Wis. 2d at 190.

The State made this same argument in *State v. Selders*, 163 Wis. 2d 607, 621 n.2, 472 N.W.2d 526 (Ct. App. 1991) when it argued on appeal that Selders waived an alleged loss of personal jurisdiction due to an untimely

preliminary examination because he did not object at the preliminary hearing, at the arraignment, or at trial. The Court of Appeals noted, however, that Selders *did* object to the untimeliness of the preliminary examination when the State initially requested its adjournment of the hearing and the Court noted that Selders maintained his pleas of not guilty throughout the case. *Id.* As such, the Court held there was no waiver, notwithstanding the lack of a continuous objection. *Id.*

In Butler's case, on March 24, 2020 he filed a pro se "Demand for Speedy Trial." (13). In that demand, he noted that he had a right to a timely preliminary examination within 10 days of his initial appearance and argued that personal jurisdiction over him had been lost due to the untimeliness of holding his preliminary examination. (13:1-2). Since raising the issue of the untimeliness of his preliminary hearing, Butler has continuously maintained his not guilty pleas and has not otherwise withdrawn his objection to the Court's jurisdiction. As such, the State's claim of waiver must fail.

II. Butler did not invite error by requesting that any appointed counsel be able to fulfill his request for a statutory speedy trial.

The State argues that by having requested a speedy trial on March 24, 2020 – and thereafter maintaining the position that he wanted a speedy trial

– that Butler himself contributed to the dilemma of the inability of the State Public Defender to assign counsel for him. (State's Br. 28-29).

Essentially, what the State is arguing is that as time when on and it became the position of the State Public Defender that its inability to locate counsel for Butler was due, in part, to the speedy trial demand, that Butler should have withdrawn the demand. Apparently, what the State would have defendants in Butler's situation do is make a choice as to which fundamental rights they want to forego in the hope that they might be able to later exercise other fundamental rights.

In further support of its argument, the State asks the Court to consider that once he was able to be released on bail (after more than one year in custody), he "jettisoned his speedy trial rights and requested an adjournment of the trial date" and that he "should not be allowed to create his own error by this kind of gamesmanship." (State's Br. 29).

Butler was not engaging in any sort of gamesmanship while he spent almost one year in custody while the State Public Defender tried to find counsel for him who would agree to pursue his request for a speedy trial. Statutory requests for speedy trial are routinely made by custodial defendants because they understand that if they don't make a request for speedy trial that they will likely spend months or years in custody waiting for

their trial. Faced with the dilemma of spending months or years in custody without a reliable and timely trial date, defendants many times choose to request a speedy trial. Once released from custody, however, defendants are no longer entitled to a statutory speedy trial. And once released from custody, the uncertainty of languishing in jail awaiting a trial date no longer exists. As such, it was perfectly acceptable for Butler and counsel to indicate to the Court that Butler was willing to withdraw his previous request for a speedy trial once he was no longer in custody. This is especially true given that as counsel for Butler had stated, he had only been in possession of the evidence against Butler for about 90 days and believed that without the confines of a speedy trial that the defense could benefit from additional time to prepare for trial – especially in light of the seriousness of the allegations, the penalties involved, and the fact that the parties were still operating during the COVID-19 pandemic. (R:108-8; 109-6; 97-12).

III. There is no substantive difference between the situation faced by Lee and that faced by Butler.

Lee was subjected to a procedure of weekly or biweekly status hearings which delayed the holding of his preliminary hearing. *State v. Lee*, 396 Wis.2d 136, 142-50 (Ct. App. 2021). Similarly, Butler was subjected to a procedure of weekly or biweekly adjourned initial appearances which delayed

the holding of his preliminary hearing. The substance of the hearings both men faced were nearly the same. Butler and Lee were brought into court, the judge or commissioner advised them no lawyer had been appointed for them, and they were shuttled back to jail where they remained incarcerated until the next meaningless hearing.

However, the similarities described above in the way that these two defendants were detained, and their preliminary hearings delayed, the sheer timeline of Butler's situation is considerably more egregious than Lee. Lee's ten-day preliminary hearing deadline had been exceeded by 103 days. Butler's deadline was exceeded by 332 days. The two men faced a nearly identical situation: an endless parade of meaningless hearings. This Court found the 103-day wait of Lee too egregious. The 332-day wait of Butler demands the same finding.

The State points out that on July 1, 2020 the assigned Circuit Court Judge "became personally involved in the efforts to locate counsel for Butler." (State's Br. 30). That involvement, however, did not occur for more than 8 months after Butler first appeared in court and it took an additional 42 days thereafter before one of the attorneys that the Judge spoke to could be certified and ultimately appointed by the Office of the State Public Defender to accept an SPD appointment. At no time, however, did the Circuit Court

seriously consider appointing an attorney at County expense to represent Butler.

The State asserts in its brief that "there is absolutely no evidence that the difficulty in locating counsel for Buter had anything to do with the SPD rate of compensation." (State's Br. 31). However, according to the local news media report that the State references in its brief (State's Br. 13), "Brown County court officials believe a major reason for the public defender shortage is pay. State law says the public defender's office must pay outside attorneys $70 an hour. 'I think a lot of people once they have experience, once they can really get their own clients, they can charge so much more than $70 an hour that they really don't want to take these cases,' said (Tammy Jo) Hock (a Brown County Circuit Court Judge)."[1] In addition, its worth noting that in the *Lee* case, it took the circuit court over 100 days to appoint counsel on what appeared to be a simple felony drug possession and identity theft case. We will never truly know whether the rate of compensation of an SPD appointment versus the rate of an appointment at county expense would have made a difference in either this case or the *Lee* case - because neither jurisdiction ever seriously contemplated it (likely for budgetary reasons).

[1] https://fox11online.com/news/local/green-bay/court-officials-public-defender-shortage-causing-delays-driving-up-local-costs

CONCLUSION

The procession of injustices suffered by Butler in this case is truly frightening. The State jailed Butler without a lawyer over an extremely prolonged period of time, denied him his right to a prompt probable cause determination, denied him his right to a timely preliminary hearing, denied him his statutory and constitutional rights to a speedy trial, and generally denied him his constitutional rights to due process. The pure flagrancy of these actions, and the cavalier attitude of the State while it was happening, merit a strong response from this Court. For those reasons, Butler asks this Court to direct the circuit court to dismiss the Information with prejudice.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sections 809.19(8)(b), (bm), and (c), Wis. Stats. for a reply brief. The length of this brief is 1,503 words with a proportional serif font.

Electronically Signed By: Attorney Christopher L. Hartley
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