STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case Nos. 2021AP1526-CR & 2021AP1527-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RASHEEM D. DAVIS,

Defendant-Appellant.

On Appeal from Judgments of Conviction Entered in Milwaukee County Circuit Court, the Honorable Glenn H. Yamahiro Presiding, and an Order Denying a Motion for Postconviction Relief, the Honorable Frederick C. Rosa Presiding

---

REPLY BRIEF OF DEFENDANT-APPELLANT

CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
augustc@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

Wisconsin Statutes

OTHER AUTHORITIES CITED

ARGUMENT

I. The circuit court had no authority to reopen the dismissed case as it lost jurisdiction after the dismissal order.[1]

A. Subject-matter jurisdiction is not free-floating; it can only be invoked upon the filing of a criminal complaint and expires after "final disposition" of the case.

In its brief, the State claims that the circuit court had "both subject matter jurisdiction and competency" to conduct Mr. Davis' trial. (State's Br. at 13). Despite the Wisconsin's Supreme Court's attempt to "clearly distinguish" between these two concepts, *see City of Eau Claire v. Booth*, 2016 WI 65, ¶ 14, 370 Wis. 2d 595, 882 N.W.2d 738, this case shows that confusion can still exist due to the overlapping nature of the two subjects. Here, Mr. Davis is not alleging that the circuit court failed to abide by a statutory mandate, which would have created a loss of competency. *See id*. Instead, he is arguing that the court's subject-matter jurisdiction—while broadly described in the case law—is not free-floating or absolute. As the case law establishes, a court's jurisdiction "attaches" by the filing of a complaint. *State v. Aniton*, 183 Wis. 2d 125, 129, 515 N.W.2d 302 (Ct. App. 1994). That jurisdiction extends through the

[1] Mr. Davis has reorganized the State's arguments in this reply brief.

final disposition of the case. *Id.* A circuit court may have unbounded subject matter jurisdiction over all cases and controversies, civil and criminal, but this necessarily requires the existence of *a* case or controversy. It would be a perverse distortion of our law to find that courts have criminal jurisdiction to try and convict citizens absent the initiation of any criminal proceedings, or to independently hale them into court decades after a dismissal order only to summarily sentence them to prison.

B. The dismissal without prejudice was a "final disposition."

To begin with, the State misrepresents Mr. Davis' argument, alleging that he has relied on authority with respect to "territorial jurisdiction" and not "subject matter" jurisdiction. (State's Br. at 14). However, the governing language is found in *Aniton*, a published decision of this Court discussing criminal subject matter jurisdiction. *Aniton*, 183 Wis. 2d at 129-130. And, while *State v. Randle*, 2002 WI App 116, 252 Wis. 2d 743, 647 N.W.2d 324 is a "territorial jurisdiction" case, Mr. Davis reads the court's language about a lack of jurisdiction to go beyond the specific subset of jurisdiction discussed in that matter. More to the point, it is unclear why a lack of one kind of jurisdiction would create a nullity while another would not. The court has jurisdiction or it does not; a viable criminal action has occurred or it has not.

Next, the State moves to the centrally disputed issue—whether the dismissal order was a "final

disposition." (State's Br. at 14). The State acknowledges that this term of art is undefined in law. (State's Br. at 14).

Casting about for authority, the State invokes the definition in Wis. Stat. § 893.13(1), which concerns the statutes of limitation for certain civil causes of action. (State's Br. at 14). The State argues that this statute is brought into the criminal arena by virtue of its cross-reference in Wis. Stat. § 895.457(4)(a). (State's Br. at 15). This is a weak argument. The statutory section in which this language appears is designed to prevent felons from recovering damages in a civil action as a result of their own criminal conduct; it is not a criminal statute.

§ 895.457(4)(a) tolls the statute of limitations attaching to any claim that the alleged felon might bring. This tolling period begins with the initiation of a criminal case and concludes, via the cross-reference to Wis. Stat. § 893.13(1), with the expiration of the "period in which an appeal may be taken […]." The reasoning for using this definition in this context is clear and intuitive; it tells the reader nothing about how the term "final disposition" ought to be interpreted in any other context.

Finally, the State dismisses Mr. Davis' reliance on *State v. Asfoor*, 75 Wis. 2d 411, 249 N.W.2d 529 (1977). (State's Br. at 16-17). *Asfoor* is useful as negative authority—it helps explain what a final disposition *is not*. Under *Asfoor*, dismissal of individual counts within a continually-existing

criminal action does not impact jurisdiction. This is suggestive evidence that the dismissal of an entire criminal action is such a final disposition, although Mr. Davis concedes that the language of *Asfoor* is not crystal-clear. And, while the Court did discuss other considerations—such as whether jeopardy had attached or the dismissal was with prejudice—it is not clear that these are legally dispositive considerations. Thus, Mr. Davis does not agree that this authority supports the circuit court, as the State suggests. (State's Br. at 17). The only conclusive holding to take from *Asfoor* is that dismissal of individual counts will not entail a loss of jurisdiction. While that is suggestive authority for Mr. Davis' position, as argued in the brief-in-chief, the State stretches that authority too far to suggest a black-letter rule which rebuts Mr. Davis' arguments.

C. The State has not adequately shown that the circuit court had authority to reopen the proceedings.

In its brief, the State claims that courts have authority to reconsider its prior rulings, including dismissals. (State's Br. at 12). The authority cited is not applicable.

First, the State cites *Butcher v. Ameritech Corp.*, 2007 WI App 5, ¶ 44, 298 Wis. 2d 468, 727 N.W.2d 546—a civil case—for the proposition that a circuit court has authority to reconsider a prior ruling within ongoing, and complex, civil litigation. (State's Br. at 12). The applicability of this authority to this specific

criminal case is not clear and the State does not try to argue why its holding applies to this fact pattern.

Next, the State claims that Wis. Stat. § 806.07 gives the circuit court authority to reopen and revisit the dismissal order. (State's Br. at 12-13). Once again, the cases cited are non-criminal. More significantly, the State concedes that "the applicability of Wis. Stat. § 806.07 to criminal cases is debatable." (State's Br. at 16). In fact, the Wisconsin Supreme Court has already held that § 806.07 is not a criminal statute, as it is part of the rules of civil, not criminal, procedure. *State v. Henley*, 2010 WI 97 , ¶¶ 67-71, 328 Wis. 2d 544, 787 N.W.2d 350. The State tries to limit the impact of *Henley*, claiming that it only applies when criminal defendants try to use it as a mechanism for postconviction relief. (State's Br. at 16). The State's attempt at doing so, in a mere footnote, is unpersuasive. The State has cited no authority why this civil procedure statute can provide authority in a criminal action.

Elsewhere in its brief, the State suggests that the language in *Village of Trempealeau v. Mikrut,* 2004 WI 79, 273 Wis. 2d 76, 681 N.W.2d 190 that a court is "never" without jurisdiction must be read literally and must mean that the language in other cases talking about the attachment and expiration of such jurisdiction are simply not applicable. (State's Br. at 14). The State has read the language too broadly. Courts do have jurisdiction over all cases and controversies, but as stated above, this requires the existence of a case or controversy.

Finally, the State seems to suggest that the doctrine of "inherent authority" supports the court's actions, but also never develops that argument or cites any of the applicable case law discussing and defining inherent authority—and this failure to develop the claim should doom its reliance on that legal theory in this Court. (State's Br. at 15).

Accordingly, because the court was without jurisdiction and had no authority to conduct this trial, the ensuing conviction and sentence is a nullity and must be vacated on appeal.

II. Mr. Davis is entitled to a hearing on his claim that trial counsel was ineffective.

The State does not meaningfully respond to Mr. Davis' arguments regarding personal jurisdiction, asserting that the case can be resolved by examining whether there was subject matter jurisdiction. (State's Br. at 19). However, as the State acknowledges, this is a distinct legal inquiry. (State's Br. at 19).

Accordingly, because the State has failed to respond to Mr. Davis' arguments, this claim should be conceded in his favor. *Charolais Breeding Ranches LTD., v. FPC Securities Corp.,* 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). This Court should remand for a hearing on the postconviction motion.

III. Mr. Davis is entitled to a hearing on his plea withdrawal motion with respect to Milwaukee County Case No. 20CF774.

The State makes two arguments. First, the State claims that there can be no manifest injustice because the conviction in 19CF4828 was not invalid. (State's Br. at 20). Mr. Davis agrees that the legal questions with respect to 19CF4828 are dispositive and has responded to the State's arguments on that point, above.

Second, the State alleges that, even if the conviction in that case is infirm, this still would not impact the validity of his plea. (State's Br. at 20-21). Mr. Davis knew the nature of the charges and their maximum penalties; hence, there is no way a legally infirm conviction in one case could result in an invalid plea in another—so the argument goes. (State's Br. at 20). However, the State ignores the allegations set forth in Mr. Davis' motion, which establish that his (wrongful) conviction in the other case induced his plea in this case. In essence, that legal error, because it was dispositive to his decision to plead, renders the plea infirm.

The State does not meaningfully respond to Mr. Davis' argument and does not address his arguments in any substantive fashion. Because the State has failed to respond to Mr. Davis' arguments, this claim should be conceded in his favor. *Charolais Breeding Ranches LTD.,* 90 Wis. 2d at 109. This Court should remand for a hearing on the plea withdrawal motion.

IV. The evidence was insufficient to convict Mr. Davis of robbery.

In the State's view, none of the contradictory facts which undermine its sufficiency argument "matter." (State's Br. at 22). This ignores the well-settled rule "that an appellate court must consider the totality of the evidence when conducting a sufficiency of the evidence inquiry." *State v. Smith*, 2012 WI 91, ¶ 36, 342 Wis. 2d 710, 817 N.W.2d 410.

With respect to Mr. Davis' intent to deprive ARW permanently of her property, the State claims that the jury was not permitted to consider any of Mr. Davis' actions after taking the phone. (State's Br. at 22). Instead, the jury needed to cabin its analysis to his intentions "at the time he took it." (State's Br. at 22). The State cites no case law for this rule and neglects to mention that it is incompatible with Wis. JI-Criminal 923, which asks the jury to determine intent based on "all of the facts and circumstances."

Here, there was copious evidence that Mr. Davis did not have an intent to permanently deprive ARW of her phone, including evidence that he actually returned it to her. The only way for the State to succeed is for it to change the legal analysis and to insist that this Court conduct a legally improper assessment of the trial evidence.

Accordingly, by viewing all of the relevant evidence, it is clear that the State did not prove Mr. Davis was guilty beyond a reasonable doubt of the

robbery charge. This Court must vacate that conviction.

CONCLUSION

Mr. Davis therefore asks this Court to grant the requested relief.

Dated this 10th day of February, 2022.

Respectfully submitted,

Electronically signed by
Christopher P. August
CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
augustc@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 1,936 words.

Dated this 10th day of February, 2022.

Signed:

Electronically signed by Christopher P. August
CHRISTOPHER P. AUGUST
Assistant State Public Defender