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COURT OF APPEALS**

STATE OF WISCONSIN COURT OF APPEALS DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

**Appeal No. 2021AP001949-CR
Circuit Court Case No. 2018CM1416**

MICHAEL J. LEIGHTON,

Defendant-Appellant.

**ON APPEAL FROM THE FINAL ORDER DISMISSING CASE
WITHOUT PREFUDICE IN VIOLATION OF THE DEFENDANT’S
SPEEDY DISPOSITION ENTRY ENTERED IN THE KENOSHA
COUNTY CIRCUIT COURT, THE HONORABLE JASON A. ROSSELL,
PRESIDING.**

BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

Did the Circuit Court properly exercise its discretion dismissing the case without prejudice because the state failed to bring the case to trial within the time limits set forth in Wis. Stat. § 971.11(3) after Mr. Leighton's prompt disposition request?

The Circuit Court dismissed without prejudice.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are not necessary.

STATEMENT OF THE CASE

NATURE OF THE APPEAL

This is an appeal from the final judgment of the Circuit Court of Kenosha County, Hon. Jason A. Rossell, presiding; which entered an order of dismissal without prejudice based on the State's violation of Mr. Leighton's prompt disposition request pursuant to Wis. Stat. § 971.11(3).

FACTS AND PROCEDURAL HISTORY

On November 6, 2018, the State issued a complaint against Michael J. Leighton for one count of misdemeanor theft, with a repeater enhancer, and one count of fraudulent use of a credit card with a repeater enhancer. (R:3, *App.* 101-104). On or about April 3, 2020, Mr. Leighton, through certified mail, filed for a prompt disposition with the Kenosha County District Attorney's Office pursuant to Wis. Stat. § 971.11(3). (R:9:1-3, *App.* 143-145). Mr. Leighton was serving a sentence in Stanley Correctional Institution, and had a mandatory release date of January 9, 2024. (R:9:2, *App.* 144). On February 12, 2021, Mr. Leighton, by his attorney, filed a motion to dismiss the case based on the violation of Mr. Leighton's request for prompt disposition. (R:9:1-4, *App.* 143-146). On February

16, 2021, Mr. Leighton had his initial appearance and the motion to dismiss was heard. (R:19:1-10, *App.* 112-121). The court commissioner dismissed the case without prejudice and ruled:

Yeah, I guess, here's what I'm looking at as well. And I'm not aware again of any policies in the or in the correctional system that if someone again if this defendant or anyone else had tested positive for COVID that would bar an appearance by Zoom or any other or in person obviously likely in person. I don't have enough information, but I do know that the statute is clear and I don't have that authority before me now, so what I'm going to do I'm going to -- I'm going to dismiss this matter based on 971.11(3) but I'll do it without prejudice.

(R:19:8, *App.* 119).

On February 18, 2021, Mr. Leighton filed a De Novo Review Motion to Dismiss with Prejudice because the commissioner failed to state their rationale for the decision. (R:15:1-3, *App.* 107-109). The motion was reviewed de novo on May 14, 2021. (R:27:1-20, *App.* 123-142). The decision to dismiss the case without prejudice was affirmed. *Id.* The Circuit Court relied on the victim's right to restitution, Mr. Leighton's inability to participate in programming in prison, the pandemic, and the impact on Mr. Leighton's legal defense when stating his decision. *Id.*

ARGUMENT

- I. The law is clear in that a circuit court has the discretion to dismiss a case with or without prejudice when a criminal case is not brought within the 90-day time limit set forth in Wis. Stat. § 970.11(3); however, the Court erroneously exercised its discretion in dismissing the case without prejudice because it did not reason towards a rational conclusion based on the facts.**

When determining if the circuit court properly exercised its discretion in dismissing the criminal case against the defendant without prejudice, a reviewing court will overrule a discretionary decision by a circuit court if the circuit court erroneously exercise its discretion. An erroneous exercise of discretion occurs when the exercise of discretion is based on an error of law, when the circuit court does not consider the facts of record under the relevant law, or does not reason its way to a rational conclusion. *State v. Davis*, 248 Wis. 2d 986, 637 N.W.2d 62, 2001 WI 136 (2001).

Davis lists a number of factors that a circuit court should consider when determining whether to dismiss a criminal case with or without prejudice. *Id.* at 1005-1006. Some relevant factors include: the reasons for, and the length of the delay; whether the type of case makes it unreasonable to expect preparation within the statutory time period; the defendant's conduct contributing to the delay; the harm to an accused resulting from the delay, such as anxiety and concern; the effect on an accused's legal defenses due to the delay; the impact on the programs and movement within the institutions; the effect on an accused's ability to transfer to a less secure facility; the effect of the delay and dismissal on the public interest in the prompt prosecution of crime; and the impact of the delay and dismissal on

the victim. *Id.* The circuit court is to consider and balance these factors, but this is not a complete list and can consider other factors. *Id.*

Once Mr. Leighton filed his prompt disposition, the burden is completely shifted on the state to comply with the statutory time limit for bringing a case to trial. Wis. Stat. § 971.11(3). “Once the district attorney receives the request under sub. (1), the responsibility for prompt disposition is placed on the district attorney.” *State v. Lewis*, 2004 WI App 211, 277 Wis. 2d 446, 690 N.W.2d 668, 03-3191.

The Court in the case at hand heavily relied upon the fact that Covid-19 had greatly impacted the court system and the Wisconsin Supreme Court Order stopping all jury trials that was issued in March 22, 2020. (R:27:15-16, *App.* 137-138). The Appellant’s contention is not that the Court considered the pandemic in its decision, it certainly caused many delays in the judicial system. The issue is that the Court gave the State a complete pass despite their complete lack of urgency and effort that they put into complying with the prompt disposition request made by Mr. Leighton because of the pandemic. Kenosha County Circuit Court resumed trials on August 31, 2020, with additional safety precautions put in place. (R:9:1, *App.* 143). Mr. Leighton served the Kenosha County District Attorney’s Office on April 3, 2020, shortly after the Supreme Court suspended all jury trials and about a year and a half after the case was charged. (R:9:1-4, *App.* 143-146). At the De Novo Review hearing, the State claims that a writ to produce Mr. Leighton from Stanley Correctional Institution was prepared, however, it was not signed by any court, nor was it ever executed. (R:27:9, *App.* 131). Stanley Correctional confirmed with an employee at the State Public Defender’s Office that they never received a request to transport Mr. Leighton. (R:18:1, *App.* 105). Stanley Correctional further indicated that they were not able to deny any writs even in the Covid-19 era, and that they were allowing defendants to do zoom hearings in May of 2020. *Id.* Even if jury trials were being tried within the statutory time limit, the State was in no position to comply with Wis. Stat. §

971.11(3) regardless. There was no reason for a delay in this case, and the State should not be allowed to use the pandemic as an excuse for their shortcomings. And even if the Court only considered the time elapsed after jury trials resumed, which was August 31, 2020, Mr. Leighton was still only brought in for an initial appearance in February 16, 2021, over two months beyond the 90-day time limit.

Looking at additional *Davis* factors, this is a misdemeanor case which would not make it unreasonable to prepare for within 90 days. *State v. Davis* 248 Wis. 2d at 1006. The fact that this was a misdemeanor case, and that Mr. Leighton was incarcerated serving other sentences, is what seems to have caused the state to overlook this case. Based on their lack of action, it was apparent that this case was not their top priority. Moreover, Mr. Leighton obviously did nothing to contribute to the delay. It is fair to question when this case would have been heard if he hadn't filed for prompt disposition. Additionally, Mr. Leighton was deprived of having his classification in the prison system changed due to his pending case. This caused him anxiety, and deprived him of more lucrative work opportunities within the facility. (R:27:6, *App.* 128). Further, the delay obviously diminishes his ability to receive concurrent time. His mandatory release date was January 9, 2024, it could be argued that every day that passes without his case resolving diminishes his ability to receive concurrent time. (R:9:2, *App.* 144). All of these factors favor Mr. Leighton. The public also has an interest in cases being heard and resolved quickly, including victims and defendants, regardless of if they are in custody serving other sentences.

The State argues that they acted as quickly as they could have. (R:27:9, *App.* 131). The Appellant vehemently disagrees with that statement. The State's admits that they never sent a writ, not to mention it wasn't even signed by a court. *Id.* Preparing the writ, but never executing it, is not a good reason for a delay. *Id.* During the midst of the pandemic, timelines may have been tolled, and court hearings may have been getting adjourned, but that is not an excuse for the State not following through with the writ.

The one factor that weighs in favor of the State is the victim's right to restitution. In the same vein, the delay also may have negatively impacted the victim, and that weighs in favor of Mr. Leighton because it is the State who caused the delay. It should be noted however, that no restitution request was filed in this case prior to its dismissal. Despite all of the factors that weigh in favor of Mr. Leighton, the Court relies on a victim's right to restitution and the fact that Mr. Leighton's legal defenses would not be negatively affected by the delay, in determining a dismissal without prejudice. (R:27:15-20, *App.* 137-142). The Court also speculates as to how much restitution may be owed, even though no formal restitution request was filed, nor was there any mention of an amount by the State. (*Id.* at *App.* 138).

This case is a clear and obvious case for dismissal with prejudice. The majority of the factors weigh heavily in Mr. Leighton's favor, most notably, the cause for delay was on the prosecutions lack of action. If we do not count the time elapsed while trials were suspended, the State still exceeded the 90-day time limit by a substantial margin, and made no effort to even try to comply with Mr. Leighton's request. This is a clear violation of Mr. Leighton's right for a prompt disposition. The fact that it is a misdemeanor should not have any weight on the violation of his right under Wis. Stat. § 971.11(3). This was not a complex case; this was a case that was overlooked and neglected by the State. It is the Appellant's belief that the Court erroneously exercised its discretion in dismissing the case without prejudice because it did not reason towards a rational conclusion based on the facts.

CONCLUSION

For the reasons outlined above, the Appellant respectfully requests that the Circuit Court's order of dismissal without prejudice be overturned, and dismissed with prejudice. We further ask, that the judgment of conviction entered in the

refiling of this case after the dismissal, Kenosha County Case No. 2021CM177, be vacated.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,163 words.

Electronically signed by Conner Helvig
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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I certify that an electronic copy of this brief complies with the requirement of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed brief filed this date. A copy of this certificate has been served with the paper copies of this brief and served upon all opposing parties.

Electronically signed by Conner Helvig
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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(8g)(b)

I hereby certify that filed with this brief, in a separate document, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under Wis. Stat. §§ 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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