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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

CASE NO. 2021AP001949-CR

State of Wisconsin,
Plaintiff-Respondent,

Case No. 2018CM1416
(Kenosha County)

v.

Michael J. Leighton,
Defendant-Appellant.

ON APPEAL FROM THE KENOSHA COUNTY CIRCUIT COURT'S ORDER,
THE HONORABLE JASON ROSSELL PRESIDING, DISMISSING THE CASE
WITHOUT PREJUDICE

BRIEF OF PLAINTIFF-RESPONDENT

BY:

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BRIEF OF PLAINTIFF-RESPONDENT

ISSUE

Respondent does not dispute Appellant's
characterization of the issue presented.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Respondent agrees with Appellant that oral argument
and publication are not necessary.

STATEMENT OF THE CASE

Respondent does not dispute Appellant's
characterization of the Facts and Procedural History of the
case. Respondent would merely add that after the initial
case, Kenosha County Circuit Court Case No. 2018CM001416,
was dismissed without prejudice, the State filed identical

charges against the defendant in Kenosha County Circuit Court Case No. 2021CM000177. The defendant pled guilty to Misdemeanor Theft in that case on June 1, 2021 and stipulated to restitution to the victim in the amount of \$400. The Circuit Court sentenced the defendant to 60 days in jail, concurrent with his prison sentence.

ARGUMENT

II. THE CIRCUIT COURT DID NOT ERRONEOUSLY EXERCISE ITS DISCRETION IN DISMISSING THIS CASE WITHOUT PREJUDICE.

Appellant accurately summarizes the holding of State v. Davis, 348 Wis.2d 986 (2001) as it pertains to the standard of review of a Circuit Court's exercise of discretion. Appellant also accurately lists the factors that, according to the Davis Court, a Circuit Court should consider when determining whether to dismiss a case with or without prejudice for failing to comply with Wis. Stat. § 971.11(3). As a result, Respondent will not repeat them here.

In this case, the Circuit Court properly exercised its discretion when it determined that the dismissal should be without prejudice. The Circuit Court emphasized that, due to the Wisconsin Supreme Court's order of March 22, 2020 regarding the suspension of jury trials during the Covid-19 Pandemic (as amended on April 15, 2020), it was impossible

for the State and the Court to comply with Appellant's
Request for Prompt Disposition:

The Court has to -- the factors in Davis, and the issue that occurs is on April the 3rd, 2020, when Mr. Leighton had filed with the district attorney his request for prompt disposition, the time limits had been tolled on March 22nd, 2020, by order of the Supreme Court of the State of Wisconsin when they entered an order suspending all jury trials in the State of Wisconsin.

At that time there was no possibility for the State to comply with Mr. Leighton's request. It was absolutely impossible to bring a jury trial within 90 days, because jury trials were suspended by the Supreme Court order, and that order filed on March 22nd, 2020, and then extended by the subsequent order, which still to this day remains in effect, the order of April the -- or excuse me, the order of May 22nd, 2020, which was an extension of that order, which to this day still remains, that's why I'm masked with individuals in this courtroom, despite the fact that -shoot, excuse me.

(INTERRUPTION IN PROCEEDINGS)

THE COURT: Sorry, back on the record. The Court is still under the same orders. Now, those orders allow jury trials to proceed after the -- after the Court, meaning this Court, permitted -- or after -- let me be a little clearer. It permitted jury trials to proceed only after the State had -- only after the State -- or only after the chief judge had filed a order -- boy, this is actually even simpler. It would only allow jury trials to proceed after the chief judge of the district, which is me, approved the plan.

The plan didn't get approved until well after the 90 days after Mr. Leighton filed for prompt disposition. Therefore, the answer would be, yes, if it wasn't done within the 90 days, the case would be dismissed.

But what happens afterwards then is irrelevant. So the case is dismissed, but it's dismissed without prejudice. It's dismissed without prejudice

because the State by order of the Supreme Court, both the March 22nd order and the May 15th order which then continued on, was unable to comply with the interstate agreement. Now -- or the prompt disposition to be clear.

Now, what happens after that, yes, that's relevant and considering the factors in Davis, yes, I do recognize that Mr. Leighton has not been able to get to a lower facility or even to a place where he could get potentially released to the community to work while he finishes his sentence, there has been -- it's not an issue for parole, but delay for programming.

But the other issue that I do need to take into consideration in this matter is Wisconsin Constitution Provision Section 9M, which under sub 2 gives the victim a right to restitution.

This is a case of theft in which there is allegations of thousands -- of over \$1,000 of loss. The Court needs to consider under the Davis factors the effect of the delay and dismissal on the victim

One of the effects would be the inability to receive restitution, which the Wisconsin State Constitution provides as a right to the victim. The fact that we have been in a pandemic situation, and I've not heard anything that it changes any of Mr. Leighton's legal defenses in this matter nor prejudices his ability to defend against this case, leans in this Court heavily to consider the factors and to not dismiss this matter with prejudice. (R. 27, pp. 14-16).

The Circuit Court properly considered the appropriate factors as set forth by the Davis Court when it decided to dismiss the case without prejudice. The Court considered the reasons for the delay, the harm to the defendant resulting from the delay, the effect on his ability to defend himself,

the impact on his incarceration status, and the impact on the victim. The Court found that none of these factors warranted dismissal with prejudice.

But perhaps most importantly, the Court found as a matter of law that it was impossible for the Court and the State to comply with the defendant's request. There was no way for the defendant to have a jury trial within the 90 day period pursuant to the Wisconsin Supreme Court's order.¹ It would have been unjust for the Court to dismiss the case with prejudice for something beyond the State and the victim's control.

CONCLUSION

For the foregoing reasons, the Circuit Court's order dismissing this case without prejudice should be affirmed.

Dated at Kenosha, Wisconsin, this 3rd day of February, 2022.

Electronically signed by
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¹ The Circuit Court also noted that the defendant never waived his right to a jury trial or requested a bench trial. R. 27, p. 19.

CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained within Section 809.19(8)(b), (bm), and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 9 pages.

Dated this 3rd day of February, 2022.

Electronically signed by
Thomas C. Binger

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