STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2022AP92-CR; 2022AP93-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

DEBRA L. RIPPENTROP,

Defendant-Respondent (2022AP92-CR)

and

STEVEN E. RIPPENTROP

Defendant-Respondent (2022AP93-CR).

ON APPEAL FROM ORDERS GRANTING DEFENDANTS' MOTIONS TO DISMISS, ENTERED IN THE JUNEAU COUNTY CIRCUIT COURT, THE HONORABLE STACY A. SMITH, PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT

JOSHUA L. KAUL
Attorney General of Wisconsin

JENNIFER L. VANDERMEUSE
Assistant Attorney General
State Bar #1070979

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
vandermeusejl@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

The Rippentrops argue that the circuit court's ruling should be affirmed under *State v. McGuire*,[1] a case concerning an alleged due process violation for a thirty-six-year pre-charging delay. They further argue, for the first time, that their right to a speedy trial was violated because of time that lapsed *after* the State filed charges. And finally, they argue that the circuit court's dismissal can be affirmed on alternative grounds because the verbal agreement was not void as contrary to public policy.

All three arguments fail. The Rippentrops failed to show (and the circuit court did not find) that any pre-charging delay arose from an improper motive, resulting in actual prejudice to their defense. Their new speedy trial argument is forfeited and without merit. And the circuit court correctly concluded that the verbal agreement is contrary to public policy and unenforceable.

Criminal cases cannot be dismissed with prejudice prior to jeopardy attaching, except for a violation of the constitutional right to a speedy trial or another constitutional right identified in state or federal law. Because there was no constitutional basis to dismiss these cases with prejudice, the circuit court's dismissal orders must be reversed.

[1] *State v. McGuire*, 2010 WI 91, 328 Wis. 2d 289, 786 N.W.2d 227.

ARGUMENT

A. The Rippentrops failed to establish a due process violation for a pre-charging delay.

The Rippentrops argue that Solovey's misconduct caused a pre-charging delay in violation of their due process rights under *State v. McGuire*, 2010 WI 91, 328 Wis. 2d 289, 786 N.W.2d 227.[2] This argument misses the mark.

In their motion to dismiss, the Rippentrops claimed that the alleged misconduct impacted their right to a speedy trial and their right to present a defense, but they did not tie those arguments to the due process standard in *McGuire*. (R. 76:5; *see also* R. 89.) But even if they had, they failed to establish a due process violation under that standard. Dismissal was therefore unwarranted, even if one were to analyze this case under *McGuire*.

To determine whether pre-indictment delay constitutes a due process violation, courts should consider (1) whether the defendant has suffered actual prejudice arising from the delay; and (2) whether the delay arose from an improper motive or purpose such as to gain a tactical advantage over the accused. *McGuire*, 328 Wis. 2d 289, ¶ 45.

Here, the court made no finding that there was an improper delay, nor did the court find that the Rippentrops sustained actual prejudice in their criminal cases as a result of that delay. (R. 89:46–52.)

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[2] The State agrees that if a defendant establishes a due process violation under *McGuire*, the logical result would likely be dismissal of the charges with prejudice. *McGuire* does not appear to be inconsistent with *State v. Braunsdorf*, 98 Wis. 2d 569, 297 N.W.2d 808 (1980), which addressed whether a circuit court had inherent authority to dismiss charges with prejudice on non-constitutional grounds prior to jeopardy attaching. Regardless, both cases compel reversal here.

According to the Rippentrops, the circuit court found that the pre-charging delay "arose from what it believed to be an improper purpose on the part of the State – to coerce the Rippentrops into voluntarily agreeing to terminate their parental rights to Mark." (Rippentrop Br. 10.) They cite to the transcript from the hearing denying their motion to dismiss for specific performance, which is irrelevant to the circuit court's decision to deny their motion to dismiss *for prosecutorial misconduct*. And the citation does not support their assertion; the circuit court made no finding that Solovey caused a delay, let alone one that was motivated by an improper purpose, such as to gain a tactical advantage over the accused. (R. 67:112.)

The Rippentrops seem to suggest that Solovey's misconduct, which may have had the effect of a delay in charging, meets the standard for a due process violation. (Rippentrop Br. 11.) It does not. A consequential effect of a delay is not the same as a motive to cause the delay. The *McGuire* court made this clear. It noted that in *Lovasco*,[3] the United States Supreme Court "refused to find a due process violation based upon the facts of the case—in which the state did not seek a tactical advantage." *McGuire*, 328 Wis. 2d 289, ¶ 49. *Lovasco*'s language "supports a distinction between prosecutions that are delayed because of an improper state motive and those that are delayed for other reasons." *Id*.

Nor did the Rippentrops show that they sustained actual prejudice to their defense. To establish actual prejudice, "the showing must be concrete, not speculative." *McGuire*, 328 Wis. 2d 289, ¶ 53.

[3] *United States v. Lovasco*, 431 U.S. 783 (1977).

McGuire is instructive on this point. There, a defendant sought to bar criminal charges on due process grounds, because thirty-six years had lapsed between the commission of the offenses and the criminal charges. *McGuire*, 328 Wis. 2d 289, ¶ 44. McGuire claimed that the 36–year passage of time prejudiced his defense, because critical witnesses died and evidence was destroyed. *Id*.

The supreme court disagreed. *Id*. ¶ 54. "Simply identifying deceased witnesses and describing testimony that they *might* have provided does not satisfy the requisite showing of actual prejudice." *Id.* ¶ 54. While McGuire identified potential witnesses and evidence that might have been relevant, "his assertions about what that testimony would prove [were] speculative." *Id*. ¶ 56. Thus, he failed to demonstrate the actual prejudice required to prove a due process violation. *Id*.

The Rippentrops have not shown actual prejudice in their cases, either. They point to the arguments they made in their motion to dismiss. (Rippentrop Br. 11–12; *see also* R. 76:5.) But those arguments fall drastically short of establishing actual prejudice.

The impact on their right to remain silent is irrelevant to the prejudice analysis because is not an effect of a *charging delay*; rather, it is an arguable effect of the alleged misconduct itself.[4] Regarding their ability to contest the CHIPS/TPR proceedings, that also has no bearing on their ability to defend themselves in their criminal cases, which is the relevant

[4] Further, there are ways to address that issue to the extent appropriate, as explained in the State's opening brief. (State Br. 26–27.)

inquiry for actual prejudice.[5] A defendant has a due process claim if "the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice *in presenting his defense*." *McGuire*, 328 Wis. 2d 289, ¶ 50 (citation omitted) (emphasis added).

The Rippentrops' right to a speedy trial was not constitutionally impacted here, as explained in the State's opening brief and as explained again below. As to their alleged right to present a defense, the Rippentrops assert that they "made no effort to collect or preserve evidence relevant to their defense," nor did they "record their memories, interview witnesses or preserve relevant evidence." (R. 76:5.) But they did not explain what evidence they would have preserved, who the witnesses were, what testimony they would have provided, or what difference recording their memories would have made. (R. 76:5.)

Like the defendant in *McGuire*, the Rippentops' assertions for actual prejudice are either irrelevant or speculative. Because they failed to establish a prosecutorial delay in violation of their due process rights, dismissal cannot be affirmed under the *McGuire* line of cases.

B. The Rippentrops' right to a speedy trial was not violated.

In their motion to dismiss, the Rippentrops argued that Solovey's misconduct affected their right to a speedy trial. (R. 76:5.) At the motion hearing, they acknowledged that one's right to a speedy trial is not implicated until charges are filed. (R. 89:16.) The circuit court rejected their speedy trial

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[5] The Rippentrops said that they gave up their parental rights "and the ability to gain valuable evidence concerning the underlying allegations." (Rippentrop Br. 12; 76:5.) But they did not explain what that valuable evidence was. (R. 76:5; 89.)

argument because it centered on pre-charging events, namely, Solovey's non-prosecution agreement with them. (R. 76:5; 89:16–17, 51.)

On appeal, the Rippentrops argue for the first time that their right to a speedy trial was violated by delays that occurred *after* charges were filed. (Rippentrop Br. 14–15.) This argument was not raised below, and it did not form the basis of the circuit court's orders of dismissal. As such, it is forfeited.

In general, issues not raised or considered in the trial court will not be considered for the first time on appeal. *Brown Cty. v. Dep't of Health & Soc. Servs.*, 103 Wis. 2d 37, 42, 307 N.W.2d 247 (1981). This rule is one of judicial economy and administration, and in appropriate cases, appellate courts may decide to reach forfeited issues. *Id.* Appropriate cases include when the forfeited issue presents an important question of law, and when the parties have thoroughly briefed the issue. *Id.*; *Wirth v. Ehly*, 93 Wis. 2d 433, 444, 287 N.W.2d 140 (1980) (superseded on other grounds).

The Rippentrops' new speedy trial argument meets none of these criteria. They have not even attempted to show that this is an "important" issue of law that warrants this Court's consideration. Further, their new argument requires a record-intensive inquiry that is undeveloped in briefing.

A reviewing court determines whether a speedy trial violation occurred under the totality of the circumstances. *State v. Urdahl*, 2005 WI App 191, ¶ 11, 286 Wis. 2d 476, 704 N.W.2d 324. Courts employ a four-part balancing test to determine whether a person's constitutional right to a speedy trial was violated, considering: (1) the length of delay; (2) the reason for the delay; (3) whether the defendant asserted the

right to a speedy trial;[6] and (4) whether the delay resulted in prejudice to the defendant. *Id.* (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).

Because the Rippentrops did not make this argument previously, the State has had no opportunity to thoroughly brief these factors. And proper briefing would be a record-intensive endeavor. "When considering the reasons for the delay, courts first identify the reason for each particular portion of the delay and accord different treatment to each category of reasons." *Urdahl*, 286 Wis. 2d 476, ¶ 26. Thus, among other things, an analysis of the second factor would require a close review of all proceedings after the complaints were filed.

Regardless, the argument would fail on the merits. Post-charging events were largely due to litigation over unusual circumstances and factors intrinsic to the cases. When a delay results from the "complexity of the case," and "was not a deliberate attempt on the part of the state to hamper the defendant," there is no denial of the speedy trial right. *Day v. State*, 61 Wis. 2d 236, 246, 212 N.W.2d 489 (1973). Further, delay caused by something intrinsic to the case, such as witness unavailability, is not counted. *State v. Ziegenhagen*, 73 Wis. 2d 656, 668, 245 N.W.2d 656 (1976); *Barker*, 407 U.S. at 531, 534. And if the delay is caused by the defendant, it is not counted. *Barker*, 407 U.S. at 530.

Here, post-charging events were largely driven by the Rippentrops' motions to dismiss. The first motion was filed in November 2019, almost nine months after the State filed the complaints. (R. 1; 14.) That motion evolved into a motion for specific performance (R. 61), which was denied at a hearing in October 2020 (R. 67). The Rippentrops' attorneys informed

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[6] While a defendant need not raise speedy trial in circuit court to preserve it for appeal, this is not the Rippentrops' appeal. Forfeiture rules apply.

the court that they would consider appealing that ruling. (R. 67:113.) Rather than appeal, the defendants filed a motion to dismiss for prosecutorial misconduct in September 2021, nearly a year later. (R. 76.) Post-charging delays were largely attributable to the defendants' motions and complex issues arising from those motions, namely, whether the cases should proceed at all. These delays should not be counted against the State.

The Rippentrops' new speedy trial argument should not be considered, and it does not support the circuit court's ruling, in any event.

C. The verbal agreement is void and unenforceable.

Solovey agreed not to bring criminal charges for child abuse if the Rippentrops fulfilled certain conditions, including voluntary termination of parental rights to Mark. The Rippentrops argue that this verbal agreement should be enforced against the State. (Rippentrop Br. 15–19.) They rely on plea bargain cases to support their position. A closer look at these cases show why their argument lacks merit.

"A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest." *State v. Wills*, 187 Wis. 2d 529, 536–37, 523 N.W.2d 569 (Ct. App. 1994) (citation omitted). "It is the ensuing ... plea that implicates the Constitution." *Id.* (citation omitted) (emphasis omitted). "Although a defendant has no right to call upon the prosecution to perform while the agreement is wholly executory, *once the defendant has given up his bargaining chip by pleading guilty, due process requires that the defendant's expectations be fulfilled*." *Id.* at 537 (citation omitted) (emphasis added).

Here, the verbal agreement was not a plea bargain; indeed, the Rippentrops did not enter pleas at all. The due process concern triggered in the plea bargain cases does not come into play. The Rippentrops cannot use these cases to argue that the State was required to fulfill their expectations, especially when that agreement was never vetted by any court, as would be in the case of a plea.

The Rippentrops cite *State v. Bond* and *State v. Castillo* to argue that the State is bound by agreements outside the plea context. (Rippentrop Br. 18.) But in both of those cases, the agreements at issue were disclosed to the court. *State v. Bond*, 139 Wis. 2d 179, 180, 407 N.W.2d 277 (Ct. App. 1987); *State v. Castillo,* 205 Wis. 2d 599, 604–06, 556 N.W.2d 425, (Ct. App. 1996). A court's review ensures the agreement is lawful and enforceable. No court reviewed the agreement in this case.

The Rippentrops argue that the agreement was not contrary to public policy. (Rippentrop Br. 18–20.) They claim that "there is no such public policy to the effect that a defendant cannot trade one valuable thing in exchange for another." (Rippentrop Br. 18.) They are wrong.

A contract will not be enforced if it violates public policy. *In re F.T.R.*, 2013 WI 66, ¶ 68, 349 Wis. 2d 84, 833 N.W.2d 634; *see also Jezeski v. Jezeski*, 2009 WI App 8, ¶ 11, 316 Wis. 2d 178, 763 N.W.2d 176. Public policy may be expressed by a statute. *Id.* A court may declare a contract void on public policy grounds only if it determines that the interests in enforcing the contract are clearly outweighed by the interests in upholding the policy that the contract violates. *In re F.T.R.*, 349 Wis. 2d 84, ¶ 68. The circuit court correctly did that here.

Wisconsin Stat. § 48.41 expresses a policy that voluntary termination of parental rights must be, in fact, voluntary. A court "may terminate the parental rights of a parent after the parent has given his or her consent as specified in this section." Wis. Stat. § 48.41(1). Further, "[t]he judge may accept the consent only after the judge has explained the effect of termination of parental rights and has questioned the parent, or has permitted an attorney who represents any of the parties to question the parent, and is satisfied that the consent is informed and voluntary." Wis. Stat. § 48.41(2)(a).

Wisconsin law is clear that a parent's consent to terminate their rights must be voluntary, that is, free of coercion. Wis. Stat. § 48.41; *In Int. of D.L.S.*, 112 Wis. 2d 180, 194, 332 N.W.2d 293 (1983). During a TPR hearing, parents answer questions to show that consent to terminate is voluntary. (R. 67:109–10; *see also* R. 51:14–15, 22–25.)

Here, the circuit court correctly found that an agreement to "sell a child or make somebody do any of those things to get somebody to terminate their parental rights" is unlawful. (R. 67:104.) Such an agreement is contrary to the policy that voluntary termination of parental rights must be truly voluntary. The interest in enforcing the agreement was outweighed by the strong policy against enforcing coerced termination of parental rights. (R. 67:104–12.) The circuit court's decision was correct and should not be disturbed.

The Rippentrops point to *Grant v. State* and seem to suggest that it supports their position. (Rippentrop Br. 18.) If anything, the case supports the circuit court's ruling. (R. 67:104–12.) The *Grant* court explained that "[a]greements by law enforcement officials, whether they be by the police or prosecutors, not to reveal relevant and pertinent information to the trial judge charged with the duty of imposing an appropriate sentence upon one convicted of a criminal offense, are clearly against public policy and cannot be respected by

the courts." *Grant v. State*, 73 Wis. 2d 441, 448, 243 N.W.2d 186 (1976). Further, "counsel representing defendants charged with crime are held to the same standard." *Id.* Lawyers "must advise the defendant that such agreements are illegal and will not be recognized by the court in the imposition of sentence." *Id.*

While this case does not deal with an explicit agreement not to disclose the arrangement to the courts, neither the Rippentrops nor their lawyer informed the TPR court that they had entered into this agreement with Solovey. Nor did Solovey disclose this agreement to the court during the John Doe proceedings when that court was considering whether there was probable cause to bring charges. This adds to the conclusion that the agreement is "clearly against public policy and cannot be respected by the courts." *Grant*, 73 Wis. 2d at 448.

CONCLUSION

The State respectfully requests that this Court reverse the orders of dismissal and remand for further proceedings.

Dated: October 12, 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Jennifer L. Vandermeuse
JENNIFER L. VANDERMEUSE
Assistant Attorney General
State Bar #1070979

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1740
(608) 294-2907 (Fax)
vandermeusejl@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 3000 words.

Electronically signed by:

Jennifer L. Vandermeuse
JENNIFER L. VANDERMEUSE
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document 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 this 12th day of October 2022.

Electronically signed by:

Jennifer L. Vandermeuse
JENNIFER L. VANDERMEUSE
Assistant Attorney General