STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appellate Case No. 2022AP189-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

BENJAMIN G. CHURLEY,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR DANE COUNTY, BRANCH XI, THE HONORABLE ELLEN K. BERZ PRESIDING, TRIAL COURT CASE NO. 17-CT-866

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE STATE'S CONDUCT IN THIS APPEAL IS DEMONSTRATIVE OF PRECISELY THE PROBLEM IN THE COURT BELOW.

Before addressing the substantive arguments of the State, it is worth reflecting on the State's conduct during the pendency of this appeal because it is demonstrative of the exact problem which gave rise to the issue raised by Mr. Churley in the first instance. More specifically, the State failed to timely file a response brief to Mr. Churley's initial brief in this matter, and on May 31, 2022, this Court noted the State's delinquency and ordered it to submit its response brief no later than June 7, 2022.

Despite the Court's order, no brief from the State was forthcoming. When this Court still had not received the State's brief by the new deadline, it graciously gave the State another opportunity and extended the deadline for it to file its brief to June 24, 2022.

In disregard of this courtesy, the State failed a *third* time to file its brief by the newest deadline. By Order dated July 26, 2022, this Court gave notice to the parties that Mr. Churley's appeal had been submitted to the Court for its consideration without the benefit of any written argument on the part of the State to be considered.

Upon learning that this matter had been submitted for consideration without its brief, counsel for the State, by letter electronically filed on August 16, 2022, averred that he did not "willingly or knowingly attempt[] to evade [his] duties as counsel in this matter," and conceded that it had "nothing to completely excuse the State's delay." *Id*.

In a subsequently filed motion dated August 23, 2022, the State moved this Court to accept the response brief it concomitantly filed with its motion. In support of its request, the State submitted an Affidavit of Attorney Frank John Remington, in which Attorney Remington averred that he "did not receive a paper or physical notice of any appeals [*sic*] documents in this case." Affidavit of Frank John Remington, at ¶ 4. Thereafter, Mr. Churley filed a written objection to the State's request that the Court accept its overwhelmingly late brief. Ultimately, the Court elected to accept the State's late filing.

The foregoing chronology is demonstrative of the State's *very* behavior in the circuit court which gave rise to the issue which Mr. Churley now raises before this Court. That is, just as the State failed to comply with the lower court's order to submit a supplemental brief—thereby causing an inexplicable and unreasonable delay in the matter below—so too has the State engaged in the same indifferent conduct with this Court by failing to comply with *three* deadlines for submitting its brief. The State's apathy in both instances is cut from like fabric and has subjected this Court to precisely the same type of unreasonable conduct of which Mr. Churley complained in the circuit court.

Mr. Churley has obviously taken issue with the State's conduct throughout this matter, both in the circuit court and in this Court, but one matter which disturbs Mr. Churley more than any other relates to the affidavit submitted to this Court by Attorney Remington. Attorney Remingotn averred that he "did not receive a paper or physical notice of any appeals [*sic*] documents in this case." Affidavit of Frank John Remington, at ¶ 4. This averment is troubling as it appears to imply that Attorney Remington never received any notice of what was transpiring in Mr. Churley's appeal. This statement is seemingly *not* wholly accurate as the State should have received notice of the appeal from *multiple* sources.

For example, whenever Mr. Churley filed documents with the circuit court regarding his appeal—documents such as, *inter alia*, a Notice of Appeal and Statement on Transcript—the State should have received notice of the filing of the same from the circuit court itself, and therefore, not have been able to complain that it had no idea that an appeal was pending. In other words, the State was clearly "opted-in" electronically to the proceedings in circuit court, and therefore, any time a document is filed in the circuit court, the State automatically received notice of the same. The State never made any allegation that it was having difficulty receiving notice of documents filed in the circuit court, rather, it complained that the problem only existed with documents filed before this Court. Based upon this dichotomy, Mr. Churley must rhetorically pose this question: If the State was receiving electronic notice of documents filed in the circuit court, then presumably, it received a copy of Mr. Churley's Notice of Appeal, so how can it credibly claim that it "did not receive a paper or physical notice of any appeals [*sic*] documents in this case?" Another inquiry would follow along the lines of asking why the State would not "tickle" (a clerical term-of-art) a future review or "come out" date to

update itself on the status of this appeal? Even if this Court accepts that the State received no notices from this tribunal, surely it did from the circuit court.

Even more problematic, however, is that this Court observed in its decision granting the State leave to file a delinquent brief that numerous *written notifications were sent to the State by this Court via U.S. Postal Service*. *See* Order of the Court of Appeals dated August 26, 2022, at p.2 n.1. Notably, the dates of these written notices correspond with the Court's orders for the State to file its response brief. In this instance, therefore, it did not matter that the State had not "opted-in" to this appeal electronically because, presumably, it was receiving *paper notices*. Despite this fact, the State still dubiously complained it "did not receive a paper or physical notice of any appeals [*sic*] documents in this case." This could possibly happen once, perhaps even twice, but for this to happen on *three* occasions stretches the bounds of credulity to their breaking point. Frankly, it is on a "the dog ate my homework" level of believability.

A final example of why Mr. Churley takes serious issue with the State's claim of ignorance in this case relates to an e-mail counsel for Mr. Churley sent to the Dane County Clerk of Courts. Mr. Churley's email to the clerk concerned this very appeal and, tellingly, Attorney Remington *was* copied in on the same. *See* Electronic Mail dated January 27, 2022, annexed to Appellant's Objection to State's Letter Motion to Accept Late Filing as Exhibit A. Mr. Churley's e-mail stated: "I e-filed a Notice of Intent to Pursue Post-Conviction Relief on [Mr. Churley's] behalf, thereby formally initiating an appeal of his conviction." *Id*. The e-mail continues, "an appeal has been undertaken . . . ." *Id*. Again, from Mr. Churley's perspective, it is a very hard pill for him to swallow that despite the State (1) being copied in on appellate documents filed with the circuit court, (2) being mailed paper copies of orders from this Court on three separate occasions, and (3) receiving a copy of an electronic mail regarding this appeal, it can still get away with "blame-shifting" the responsibility for its delinquency to others.

Ultimately, the State's delay in timely filing its brief with this Court is an exemplar of exactly the type of indifferent conduct which took place in the court below and of which Mr. Churley now complains to this Court. Mr. Churley is concerned that by accepting the State's absurdly late filing of its response brief, it will be encouraged to engage in that same wanton disregard for deadlines imposed by any judicial authority in the future because it thinks its transgressions will be

excused, as they have been every step of the way thus far.

II. ADDRESSING THE STATE'S SUBSTANTIVE ARGUMENTS.

A. The Speedy Trial Demand.

From the outset, Mr. Churley proffers that the State has mischaracterized the law applicable to his appeal. The State asserts that the circuit court "had no basis" to consider Mr. Churley's motion to dismiss for failure to prosecute in the court below because "no legally cognizable speedy trial demand was ever made . . . ." State's Response Brief at p.5.[1] This assertion mischaracterizes the law.

A formal speedy trial demand is **not** the *sine qua non* of addressing any of the claims raised by Mr. Churley, even those related to his Sixth Amendment right to a speedy trial. In the seminal case of *Barker v. Wingo*, 407 U.S. 514 (1972), the Supreme Court established four factors to be examined when determining whether an accused's right to a speedy trial has been violated. These factors included an assessment of: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) whether there was prejudice to the accused. *Id*. at 530. Notably, with respect to the third factor—whether the defendant asserted his right to a speedy trial—the *Barker* Court unequivocally held:

> **We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right**. This does not mean, however, that the defendant has no responsibility to assert his right. We think the better rule is that the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right. **Such a formulation avoids the rigidities of the demand-waiver rule and the resulting possible unfairness in its application**.

Id. at 528 (emphasis added). There is no doubt that, contrary to the State's assertion

[1]The State begins numbering the pages of its brief with the notation that its actual page five is page "1," and then continues sequentially therefrom using standard Arabic numbers. The State left its cover page unnumbered and used lower case Roman numerals for its Table of Contents page through its Statement on Oral Argument and Publication page. The State's numbering format is contrary to Wis. Stat. § 809.19(8)(bm) which requires "sequential [Arabic] numbering starting at '1' on the cover." Given this discrepancy, Mr. Churley will refer to specific pages of the State's brief not by the erroneous page numbering used by the State, but rather, by the page's actual cardinal position if the cover of its brief had been treated as page one (1) as it should have been.

that "no basis" existed to grant Mr. Churley's motion because no "legally cognizable" speedy trial demand had been filed, the constitutional standard does *not* impose the formality the State suggests. Certainly, the accused's demands, if any, for a speedy trial play a role in the analysis, but they are not dispositive of it as the State misleads.

Mr. Churley also takes issue with the State's assertion that the administrative procedures set forth in the implied consent law have no impact upon whether the accused has demanded a speedy trial. State's Brief at pp. 5-8. Mr. Churley thoroughly developed his argument on this topic in his initial brief. Nevertheless, it is worth noting that when the Seventh Circuit Court of Appeals was examining the practices set forth under 1987 Wis. Act 3—the Act which established the procedures set forth in Wis. Stat. § 343.305—it quoted the Act itself, which provided that the purpose of judicial review was to "conduct the review **as expeditiously as possible to minimize the impact upon the individual of any delay**." *Thomas v. Fiedler*, 884 F.2d 990, 992 (7th Cir. 1989)(emphasis added). Since § 343.305(8)(c)1. expressly provides that "[t]he judicial review **shall be conducted at the time of the trial** of the underlying offense under s. 346.63," the judicial review request serves in the same capacity as a speedy trial demand. Wis. Stat. § 343.305(8)(c)1. (2021-22)(emphasis added).[2] The State's position that one cannot consider a judicial review request as the functional equivalent of a speedy trial demand must, therefore, be rejected. It should not be forgotten, however, that this is but *one* prong of a multipronged test under *Barker*.

B. Prejudice Exists in this Case.

The State makes an effort to discount the prejudice identified by Mr. Churley in his initial brief as an "attempt to add[] facts to the record." State's Brief at p.10. This is simply not true. Mr. Churley levied the same assertions in his pleadings at the circuit court level regarding this issue. Moreover, nothing which Mr. Churley identified as prejudicial to his case in his initial brief, however, lies outside the realm of common sense. For example, tangible proof that witness' recollections fade over time is well within the common stock of knowledge and does not require, as the State seems to imply, that a psychologist or medical doctor be called to testify about

[2]Throughout his brief, Mr. Churley refers to the 2021-22 version of the Wisconsin Statutes. References to this biennium are made for purposes of convenience as there have be no substantive changes to any of the statutes involved since the occurrence of Mr. Churley's 2017 offense.

the frailties of human memory and recollection. All people—with the possible exception of counsel for the State—know through personal experience that memories of things which occurred in the distant past are not as fresh, sharp, and accurate as those which were imbedded more recently. For at least ninety-years or more, things which are of "common knowledge" need not be specifically proved. *See generally*, *Christiansen v. Schenkenberg*, 204 Wis. 323, 329, 236 N.W. 109 (1931). Common-sense inferences of the type noted in Mr. Churley's initial brief may permissibly be argued at any time. As Professor Blinka observed in his seminal treatise on the rules of evidence, an attorney's argument based upon common sense inferences "is 'coextensive with the ingenuity of counsel' in the use of proof." D. BLINKA, *Wisconsin Practice Series: Wisconsin Evidence*, § 401.1, at p.108 (emphasis added). Professor Blinka continued, "Perhaps it is more useful to think of relevancy as coextensive with rational thought and **common sense**." *Id*. (emphasis added). Thus understood, the State's imperious and finicky demand for greater proof of those things which Mr. Churley identified as prejudicial should not be given any heed.

C. Thirty-Five Months Delay Is Manifestly Inexcusable.

In an effort to characterize a thirty-five month delay in this case as not prejudicial to Mr. Churley, the State attempts to (1) lessen its culpability by claiming that it was "only" responsible for nine months of this delay and (2) excuse the problem by using the COVID-19 pandemic as a crutch. State's Brief at p.11. The State's argument is, however, rife with problems.

First, it should be noted that the State conceded that "the total amount of time was expansive . . ." as it related to the delay in the instant matter. *Id*. Given the expansivity of the delay, courts of supervisory jurisdiction have repeatedly and consistently held that delays of lengths which are *far less* egregious are **presumptively** prejudicial. *Watson v. State*, 64 Wis. 2d 264, 219 N.W. 398 (1974); *Hadley v. State*, 66 Wis. 2d 350, 363, 225 N.W.2d 461 (1975); *State v. Ziegenhagen*, 73 Wis. 2d 656, 245 N.W.2d 656 (1976). Mr. Churley's responsibility in this instance is not to prove prejudice because prejudice is presumed.

Second, the State's effort to color its inaction, in lay terms, as "not that bad" because it was "only" nine months is both offensive and absurd. Culpability is culpability, period. Even if one discounts the State's failure to move this matter

forward, the State conveniently overlooks the *Barker* Court's admonishment that:

> The nature of the speedy trial right does make it impossible to pinpoint a precise time in the process when the right must be asserted or waived, but that fact does not argue for placing the burden of protecting the right solely on defendants. **A defendant has no duty to bring himself to trial; the State has that duty** as well as the duty of insuring that the trial is consistent with due process.

Id. at 527 (emphasis added). The Supreme Court continued:

> [T]he rule we announce today, which comports with constitutional principles, **places the primary burden on** the courts and the **prosecutors to assure that cases are brought to trial**.

Barker, 407 U.S. at 529 (emphasis added). For reasons which are not surprising, the State failed to address, anywhere within the four corners of its brief, how it satisfied its responsibility in the foregoing regard.

Finally, the pandemic is not a cure-all which excuses any length of delay. The State banties about references to the pandemic without ever explaining at what point the failure to accommodate the due process rights of the accused must yield to the convenience of the State. Granted, these are unusual times, however, the atypicality of this time in history does not warrant the suspension of constitutional rights.

CONCLUSION

Mr. Churley respectfully requests that this Court reverse the decision of the court below.

Dated this 8th day of September, 2022.

Respectfully submitted:
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Electronically signed by:
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CERTIFICATION OF LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,991 words.

I also hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief.

Dated this 8th day of September, 2022.

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