STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 22AP959-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LUIS A. RAMIREZ,

Defendant-Appellant.

Appeal from a Judgment of Conviction and Denial of Postconviction Motions Entered in the Circuit Court for Columbia County, the Honorable Andrew W. Voigt
Circuit Court Case No.: 16CF31

REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

INTRODUCTION

Luis Ramirez challenges his convictions of battery by prisoner and disorderly conduct, as well as the denial of his postconviction motions, on the basis that his constitutional right to a speedy trial was violated by the delay of three years and ten months between the filing of the complaint and his jury trial.

Mr. Ramirez asserted his speedy trial rights during the pendency of his case and filed a motion to dismiss the charges on those grounds prior to trial. He challenged his conviction on speedy trial grounds in a postconviction motion. Mr. Ramirez also filed a supplemental postconviction motion raising additional evidence that called into question the circuit court's basis for denying his first postconviction motion. Both postconviction motions were denied, and both are properly before this court on appeal.[1]

A balancing of the four ***Barker*** factors demonstrates that Mr. Ramirez's trial was unreasonably delayed, most of the delay should be charged to the State as it was neither intrinsic to the case nor explained by ordinary demands of the judicial system, Mr. Ramirez asserted his speedy trial rights multiple times during the pendency of the case, and

[1] The State incorrectly claims that Mr. Ramirez did not perfect his appeal of the circuit court's denial of his supplemental postconviction motion. (Resp. 8-9.) In fact, the court signed a written order denying the supplemental postconviction motion on May 17, 2023. (185; Supp-App. 3.)

he was prejudiced by the delay. Each factor weighs towards finding Mr. Ramirez's speedy trial rights were violated. Because Mr. Ramirez's constitutional right to a speedy trial was violated, his conviction should be vacated, and the charges dismissed.

ARGUMENT

The government's failure to commence Mr. Ramirez's trial for three years and ten months after the filing of the complaint violated his constitutional right to a speedy trial

A. The circuit court's denial of the postconviction motion and supplemental postconviction motion are both properly before this court

Mr. Ramirez's postconviction motion and supplemental postconviction motion are both properly before this court for review, as written orders denying both motions were filed. (151; 185; Supp-App.3.)[2] This court reviews the rulings on both motions under the standard of review for a constitutional speedy trial violation: "Whether a defendant has been denied his constitutional right to a speedy trial presents a question of law, which this court reviews de novo, while accepting any findings of fact made by the circuit court unless they are clearly erroneous." ***State***

[2] Following the procedure set forth in the Court of Appeals Order dated September 30, 2022, a separate notice of appeal was not filed related to the circuit court's order denying the supplemental postconviction motion, as this court retained jurisdiction of the case during the supplemental postconviction proceedings. (Supp-App. 4-5.)

v. Urdahl, 2005 WI App 191, ¶ 10, 286 Wis. 2d 476, 704 N.W.2d 324.

B. Balancing the four ***Barker*** factors, this court should conclude that Mr. Ramirez's constitutional right to a speedy trial was violated

1. Length of Delay

The circuit court concluded, and the parties concur, that the delay in this case is sufficient to be presumptively prejudicial. (161:5-6; App.41-42; App. at 22; Resp. at 10-11.)[3] The delay in this case – of three years and ten months – is well beyond the one-year time frame held by Wisconsin case law to be presumptively prejudicial, making it necessary to consider the remaining three factors. ***Urdahl***, 286 Wis. 2d 476, ¶ 12; ***State v. Borhegyi***, 222 Wis. 2d 506, 510, 588 N.W.2d 89 (Ct. App. 1998).

[3] While conceding the delay was presumptively prejudicial, the State argues that the length of delay was not "extraordinary", and therefore should be weighed less heavily, because it did not reach the eight-and-a-half year delay present in ***Doggett v. United States***, 505 U.S. 647, 653 (1992). (Resp. at 10-11.) The State cites no support for the argument that a 46-month delay from criminal charges to trial is in any way ordinary. Further, the ***Barker*** test is clear that how a delay is weighted for or against the finding of a constitutional violation is determined by the reasons for the delay, specific to the totality of circumstances existing in the specific case, and not by any bright-line determinations. ***Barker v. Wingo***, 407 U.S. 514, 530-32 (1972); ***Urdahl***, 286 Wis. 2d 476, ¶ 26.

2. Reasons for the Delay

The State incorrectly labels the institutional delays in this case as "valid" or "ordinary" delays and argues against weighing those delays at all. (Resp. at 12-18.) However, case law is clear that the State is responsible for delays caused by the prosecutor, for delays caused by a congested circuit court calendar, and for delays caused by lack of judicial manpower. ***Hadley v. State***, 66 Wis. 2d 350, 362-63, 225 N.W.2d 461 (1975). "If the delay can be attributed to the [S]tate, then the [S]tate must justify the delay…[or] that period must be considered in deciding the issue of lack of speedy trial." ***State v. Norwood***, 74 Wis. 2d 343, 354, 246 N.W.2d 801 (1976). This court should reject the State's argument that "most" of the delay "does not count or is chargeable to Ramirez," (resp. at 12-18), as contrary to ***Barker***.

A "valid reason" is one that is "intrinsic to the case itself." ***Norwood***, 74 Wis. 2d at 354. The unavailability of a witness is intrinsic to the case. ***Scarbrough v. State***, 76 Wis. 2d 87, 96, 250 N.W.2d 354 (1977); ***Urdahl***, 286 Wis. 2d 476, ¶ 26. Addressing pretrial motions and determining a defendant's competency are issues intrinsic to the case and typically attributed "to the ordinary demands of the judicial system." ***Norwood***, 74 Wis. 2d at 355-57.[4]

[4] The State also claims, citing ***United States v. Schreane***, 331 F.3d 548, 555 (6th Cir. 2003), that "valid reasons" for delay "should be understood as a factor in the government's favor." (Resp. at 12.) However, the "valid reasons" in ***Schreane***, were that the federal government was waiting to proceed with its case against the defendant until state criminal proceedings were completed. ***Id.*** As such, ***Schreane*** is wholly inapplicable to the facts of this case, and does not support a

Here, most delays were not caused by ordinary demands of the judicial system. Aside from motions in limine addressed the morning of trial, there were no pretrial motions to litigate. Only one continuance of the trial was related to the unavailability of a witness. Instead, as the circuit court determined, delays were caused by "the retirement of the District Attorney, the new attorney being assigned from the District Attorney's Office, at least twice, the courthouse moved its entire operation to a temporary location and back" during which time "[w]e operated in a three judge courthouse with only one courtroom that could accommodate a jury trial for almost a full year." (161:4; App.40.)

Specifically, 467 days (over 15 months) of delay can be attributed to rescheduling jury trial dates due to the schedule of the assigned prosecutor. (*See* App. at 26-27.) The circuit court noted that assigning a different prosecutor may not have solved scheduling problems where only one courtroom was physically available for jury trials. (161:5; App.39.) The State argues, without legal support, that the lack of a courtroom due to renovations is somehow distinct from a lack of judicial manpower, and therefore does not count. (Resp. at 21.) This argument is senseless. The failure of the circuit court system to provide physical space for jury trials is no different than a failure to provide judicial staff – and is not an "ordinary demand of the justice system" but an institutional delay that must be weighed against the State. *See* ***Barker v. Wingo***, 407 U.S. 514, 529, 531 (1972) (placing "the primary burden on the courts and the

finding that any of the delays in this case were caused by "valid reasons."

prosecutors to assure that cases are brought to trial"). Because these delays were not caused by factors intrinsic to the case, they must be charged fully to the State. ***State v. Ziegenhagen***, 73 Wis. 2d 656, 668, 245 N.W. 2d 659 (1976).

While some of the above delays may be weighed less heavily against the State as general institutional delays, the lack of explanation by the State or circuit for the adjournments and/or not scheduling continued trial dates more promptly should weigh more heavily against the State. "The State's inability to explain any of these circumstances weighs heavily against the State in determining this issue." ***Borhegyi***, 22 Wis. 2d at 513. In ***Borhegyi***, the court of appeals found that delays in rescheduling a trial that was rescheduled to accommodate a juvenile case with statutory time limits, and then another rescheduling of the trial without explanation where again a new trial date was not scheduled promptly, "exceeds negligence and evinces a cavalier disregard of [the defendant's] speedy trial right. ***Id.*** Here, similar to in ***Borhegyi***, Mr. Ramirez's trial was continued with explanation (though presumably due to conflicts on the prosecutor's schedule/courtroom availability), and the record contains no explanation for why new trial dates were not scheduled more promptly. Most egregious is the additional six months delay between the court's denial of Mr. Ramirez's motion to dismiss on speedy trial grounds and the trial, which was not explained anywhere on the record. "Cavalier disregard toward a defendant's right to a speedy trial is an element of delay that is to be weighed most heavily against the State." ***Id.*** *citing* ***State v. Green***, 75 Wis. 2d 631, 638, 250 N.W.2d 305 (1977).

The record demonstrates that many months-long periods throughout the nearly four years that Mr. Ramirez waited for his trial went by with no action or explanation for the delay. Although the State, like the circuit court, attempt to attribute delays to Mr. Ramirez due to his requests for discovery throughout the pretrial proceedings, neither point to any specific delay caused by the discovery requests, nor is there any evidence in the record of a set-over due to the discovery request. Therefore, this court should find that the majority of the 46-month delay is weighed against the State, and some of it heavily. This factor weighs in favor of finding a constitutional violation.

3. Defendant's Assertion of Speedy Trial Right

The notion that "a defendant who fails to demand a speedy trial forever waives his rights," has been rejected by the United States and Wisconsin Supreme Courts. ***Barker***, 407 U.S. at 528; ***Day v. State***, 61 Wis. 2d 236, 245-46, 212 N.W.2d 489 (1973). The question for the court in addressing this factor then is whether the defendant actually wanted the speedy trial or was instead "consciously seeking to avoid the day of reckoning," ***Hadley***, 66 Wis. 2d at 361. In addressing this question, a defendant's assertion of his speedy trial right "is entitled to strong evidentiary weight." ***Barker***, 407 U.S. at 531-32.

The State argues that Ramirez's assertions of his speedy trial rights do not support a finding there was a violation because they came late in the proceedings, were make pro se while he was represented by counsel, and were "combined with requests inconsistent with a credible desire for a speedy trial." (Resp. at 22.) None of these reasons

suggest that Mr. Ramirez's assertions of his speedy trial right should not be treated as evidence that he did actually want a speedy trial.

Mr. Ramirez's first request, made on September 26, 2018, stated: "I want a speedy trial. I've been asking for my counsel to put a motion for this for months." (59.) To put this pro se demand in context, it was made during a nine-month time period in 2018 during which the only actions taken on the case were status conferences that were not reported, often lacked even clerk minutes in the record, and were held without making arrangements for Mr. Ramirez's appearance.

On April 15, 2019, Mr. Ramirez filed a pro se motion to dismiss on the basis that his constitutional speedy trial rights had been violated. (70:3-5.) The circuit court denied the motion on June 17, 2019. (110:11; App.13.) And while it's true that Mr. Ramirez discussed the issues of discovery and venue during this hearing, his trial date was still months away, he had a legitimate basis for believing discovery was still outstanding, and a motion to change venue was never actually filed. The reference to these issues during the hearing should not be used as evidence that Mr. Ramirez did not actually want a speedy trial.

Mr. Ramirez's repeated assertions of his speedy trial right demonstrate that he actually did want a speedy trial. This factor weighs in favor of finding a constitutional violation.

4. Prejudice to Defendant

In this case, Mr. Ramirez was incarcerated on a prison[5] sentence during the pendency of this case, but that does not mean he was not prejudiced by the lengthy delay. Simply having an additional open case can cause substantial anxiety, even to the already incarcerated. "(T)he fact is that delay in bringing such a person to trial on a pending charge may ultimately result in as much oppression as is suffered by one who is jailed without bail upon an untried charge." ***Smith v. Hooey***, 393 U.S. 374, 378 (1969).

"[T]he assertion of the right to speedy trial is in itself probative of prejudice" ***Hadley***, 66 Wis. 2d at 364. Thus, Mr. Ramirez's assertions of his speedy trial rights on two occasions is evidence that he felt prejudiced – rather than benefited – by the delay. This factor also weighs in favor of finding a constitutional violation.

[5] The State incorrectly states that Mr. Ramirez was serving "sentences for felony convictions of armed robbery and battery to law officers" at the time of the incident in this case. (Resp. at 5.) Mr. Ramirez was serving a sentence for armed robbery only. (94; 107:12.)

CONCLUSION

For the foregoing reasons, and for those argued in his opening brief, Luis Ramirez asks this Court to vacate the Judgment of Conviction and remand this case to the circuit court with an order that the case be dismissed due to the speedy trial violation.

Dated this 7th day of November, 2023.

Respectfully submitted,

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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 2,335words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 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 s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules 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 or 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.

Dated this 7th day of November, 2023.

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