STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 22AP2098 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Ned Guerra,

Defendant-Appellant.

ON APPEAL TO REVIEW THE JUDGMENT OF CONVICTION ENTERED IN FOND DU LAC COUNTY, THE HONORABLE PETER GRIMM, PRESIDING.

BRIEF OF THE DEFENDANT - APPELLANT

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STATEMENT OF THE ISSUE(S)

I. The defendant filed a motion to dismiss in the trial court. In support of his motion, the defendant argued his constitutional rights to a speedy trial were violated as his trial was repeatedly pushed off for other cases for almost two years from the date he was charged to the date of his trial. The trial court denied the defendant's motion, and the issue raised here is whether the case should be remanded back to the trial court with directions to vacate the convictions in the judgment of conviction.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The defendant does not request oral argument or publication because this case involves application of existing law to the facts of the case, and the parties' briefs should adequately address the issue.

STATEMENT OF THE CASE

On May 1, 2020, the State filed a criminal complaint against Ned Guerra (Guerra) that included one count. (2:1; App. 101). The sole count, disorderly conduct – with a repeater enhancer, contrary to Wis. Stat. § 947.01 and 939.62(1)(a), carried a maximum penalty of two years imprisonment. (2:1; App. 101). Subsequently, the State filed an amended complaint which included counts two and three. (26:1; App. 116). Both of those counts, violate state/county institution laws – with a repeater enhancer, contrary to Wis. Stat. § 946.73 and 939.62(1)(a), carried a maximum penalty of two years imprisonment. (26:1; App.116).

On August 4, 2020, Guerra filed a demand for speedy trial. (11:1; App.103). In said demand, Guerra cited to his federal and state constitutional rights to a speedy trial. (11.1; App.103).

Guerra maintained his speedy trial demand on numerous occasions, and later requested his case be dismissed since his constitutional rights to a speedy trial were not being honored. (103:4; App.108; 104:2; App.111; 105:3; App.122; 38:1; 107:3; App.140; 99:2-3; App. 143-144; 100:3; App.150; 101:2-3; App.154-155; 53:1; App.159). Ultimately, though, the court denied his request for dismissal. (108:12; App. 176).

Finally, on February 17, 2022, the defendant was given his trial. (96:1). After hearing the evidence, the jury concluded the defendant was guilty on all counts. (82:1). After doing so, the court imposed one and a half years imprisonment and six months extended supervision on each count, and each count concurrent with each other. (82:1-2).

Guerra subsequently filed a notice of appeal to this Court. (119:1). The defendant appeals because his constitutional rights to a speedy trial were violated. Ultimately, the trial court should have dismissed the case with prejudice. As a result, this issue is on appeal before this Court.

ARGUMENT

I. The defendant's judgment of conviction should be vacated since his constitutional rights to a speedy trial were violated.

A. Standard of Review.

The defendant's claim that he was denied his right to a speedy trial raises a constitutional issue which is reviewed de novo. *State v. Ziegenhagen,* 73 Wis.2d 656, 664, 245 N.W.2d 656 (1975). In reviewing constitutional questions, the trial court's findings of historical facts are subject to the clearly erroneous standard, but the application of those facts to constitutional standards and principles is determined without deference to the trial court's conclusion. *State v. Trammel,* 141 Wis.2d 74, 77, 413 N.W.2d 657 (Ct. App. 1987*).*

B. Facts.

On May 1, 2020, the State filed a one count complaint. (2:1: App.101). In said complaint, the State charged disorderly conduct with a repeater enhancer. (2:1; App.101). On that same date, the court held Guerra's initial appearance, learned he was currently incarcerated on another matter, and imposed a $1,000 signature bond. (102:2). The court then adjourned. (102:3). Notably, Guerra did not sign said signature bond. (5:1; App.181).

On May 26, 2020, Guerra was brought back to court for a potential plea/sentencing hearing. (110:2). At that time, defense counsel indicated there was no deal reached, and requested the court schedule a jury trial. (110:2). However, after further discussion, the court noted Guerra was also held on a more serious case that is set for trial in September, and, by agreement, this case would be set for a plea/sentencing "sometime in October to see where things are at". (110:3).

On August 4, 2020, the defense filed a demand for speedy trial. (11:1; App.103). In said demand, the defendant cited to his federal and state constitutional rights to a speedy trial. (11:1; App.103). As a result, the court scheduled a plea/sentencing for August 24, 2020, and a jury trial for August 25, 2020. (14:1; App.104; 103:1; App. 105).

On August 21, 2020, the State filed a motion to reschedule the trial. (14:1; App.104). In support, the State indicated a witness was scheduled to attend a training conference on the day of trial. (14:1; App.104). It also noted that the defendant's speedy trial demand was moot because he was also held on another case. (14:1; App.104).

On August 24, 2020, the court addressed the State's motion to adjourn. (103:4; App.108). At that time, the State indicated the speedy trial demand is not applicable since he was held on another matter. (103:2-3; App.106-107). The defense objected. (103:4; App.108). Nonetheless, the court stated "The Court appreciating that the defendant has a far more serious felony case with very high cash bail and noting, as a mater of law, that he is not in custody for this case before the Court, so those factors do minimize any violation of the speedy trial statute, and further I find good cause exists by the State's motion, given the prepaid training, which the Court appreciates is necessary for job responsibilities, and therefore, the State's motion is granted." (103:4; App.108). It then indicated it would try to schedule as soon as possible, and it scheduled a trial for November 10, 2020. (103:4; App.108; 53:1; App.159).

On November 4, 2020, the State filed a motion. (19:1-2). This motion sought to add two counts to the Complaint. (19:1-2).

On November 9, 2020, the court held a hearing. (104:1; App.110). At that time, the defense indicated it maintained its speedy trial demand. (104:2; App.111). Nonetheless, the court noted the defendant was held on another matter, and it ordered Guerra's trial adjourned since another defendant's case had priority over this case. (104:3-4; App.112-113). It then scheduled a motion hearing for December 22, 2020, and a trial for March 4, 2021. (53:2; App.160; 98:1).

On December 22, 2020, the court held a hearing to address the State's motion to add counts. (98:13). At that time, the court granted the State's request. (98:13).

On January 8, 2021, the State filed a three count complaint. (26:1; App.116). In said complaint, the State added counts two and three. (26:1; App.116). Both counts, violate state/county institution laws – with a repeater enhancer, contrary to Wis. Stat. § 946.73 and 939.62(1)(a), carried a maximum penalty of two years imprisonment. (26:1; App.116).

On February 4, 2021, the parties appeared to address the new complaint. (95:1). At that time, the defendant entered not guilty pleas, and the court scheduled a March 3, 2021 hearing "in case there are any last minute motions" prior to trial. (95:3).

On March 3, 2021, the parties appeared. (105:1; App.120). At that time, the State noted the defendant's custody was on another case, that it understood the court had other "matters on the Court's calendar", and that it would defer to the Court as to whether the trial should go forward. (105:2-3; App.121-122). The defense stated it desired to have the trial the next day. (105:3; App.122). Nonetheless, the court adjourned again. (105:3; App.122). In doing so, it indicated:

> The Court does appreciate the guarantees for the speedy trial, although the statute does provide the remedy initially would be relief from cash bond, and since this case doesn't have cash bond, and the Court, noting the nature of the charge, penalties as alleged, and the other case is more serious, and also with the Court's calendar and with the COVID-19 operating order, there are certain priorities and congestions on the docket which makes tomorrow's trial date not viable for this case to go forward.

(105:3; App.122). The court then scheduled a plea/sentencing for September 15, 2021, and a trial for September 16, 2021. (53:2; App.160).

On June 4, 2021, the defense filed a motion to dismiss, and on June 7, 2021, the defense filed an amended motion to dismiss. (38:1; 40:1; App.125). In furtherance, the defense argued his constitutional rights to a speedy trial were violated. (38:1-6; 40:1-6; App.125-130).

On June 17, 2021, the Court held a hearing to address the defense's motion. (106:1; App.131). In doing so, it acknowledged the exposure to the charges can be stressful and anxiety provoking, but it had a congested calendar, and it found there was no prejudice since the court did not order a cash bail bond and he was held on another matter. (106:6; App.136).

On September 15, 2021, the parties reconvened. (107:1; App.138). At that time, the State indicated it would defer to the court as to whether the trial should go forward the following day, but it noted "at this point there are other cases on perhaps more serious and also older." (107:2; App.139). In response, defense again reiterated

its desire for trial the next day. (107:3; App.140). Nonetheless, the court indicated there were a number of cases set for trial, and it would make a decision later that day whether the trial would be adjourned. (107:3; App.140).

On September 16, 2021, the parties appeared. (99:1; App.142). At that time, the State indicated it recognized there was a speedy trial demand filed, but it believed a more serious and older case took priority over this case, and it asked the court to adjourn. (99:2; App.143). In response, the defense indicated it was ready to try the case, and it asked that the case be dismissed if it is not tried that day. (99:2-3; App.143-144). In response, the Court noted the defendant was held on another case, and that it was giving priority to a different case. (99:3; App.144). The court then scheduled a plea/sentencing for October 4, 2021, and a trial for October 5, 2021. (99:4-5; App.145-146; 53:2; App.160).

On October 4, 2021, the parties appeared. (100:1; App.148). At that time, the State again indicated it would be ready to try the case the following day, it believed that another case had rights to be tried over this case, and it deferred to the court whether the trial should be adjourned. (100:2-3; App.149-150). The defense indicated it previously filed a speedy trial demand, and again noted that it was ready to proceed the next day. (100:3; App.150). Nonetheless, the court indicated there was an older more serious case set for trial the next day, and it would make a decision later that day whether Guerra's trial would be adjourned. (100:3-4; App.150-151).

On October 5, 2021, the parties reconvened. (101:1; App.153). At that time, the State noted it believed another case had higher priority, and it asked the Court to reschedule Guerra's trial. (101:2; App.154). Defense counsel noted he was previously informed the trial was off the calendar, and he argued he believed the case should be dismissed "on speedy trial grounds". (101:2-3; App.154-155). In reply, the State indicated the defense's motion for speedy trial is moot since he was not in custody on this case, and that dismissal is not appropriate remedy. (101:3-4; App.155-156). After hearing this, the Court denied the motion, and in doing so, stated the defendant was held on a more serious case, there was no prejudice, and that it had a congested calendar. (101:4-5; App.156-157). It ultimately scheduled a trial for February 17, 2022. (96:1).

On January 6, 2022, the defendant filed another motion to dismiss. (53:1; App.159). As a result, the court held a hearing on February 11, 2022. (108:1; App.165). At that time, the court made a ruling:

> The Court appreciates the thorough and detailed motion from defense counsel and arguments as well today from both attorneys. And as the Court has addressed this motion earlier, I believe the passage of time between the last motion hearing and today, I do come to the same legal conclusion that under the statutory framework for misdemeanors, the time frames were not met, and the defendant was given the benefit of those remedies of converting any cash bond to signature bonds.
>
> The Court has, nonetheless, tried its best to keep the case rescheduled, in fact, on a timely basis on the trial calendar, and, unfortunately for Mr. Guerra, that there have been older cases and more serious cases that have taken precedent, and this case has been bumped, as many others.
>
> I see that my clerk and I have done some creative scheduling, and we have put this case on a Thursday to squeeze it in behind trials on Monday, I believe, and my court practice is to try cases every week. And special needs like this one, I've added a second trial at the backside of that week to move it along and give it its date and priority because I do respect the Constitution, and Mr. Guerra is entitled to a speedy trial.
>
> I should also point out that this branch that I preside over, Branch 2, has had more jury trials than any of the other judges of Fond du Lac County since we came out of COVID. I've been firm in not delaying cases and making them get tried, those that want their trial dates. And there have been quite a few older cases that have been bumped along by Mr. Guerra's, but they got their days in court, and there were not guilty verdicts for some of those older marginal cases, but they got their day and they got their justice once the jury heard all the facts.
>
> Bottom line, Mr. Guerra has been stuck in our county jail on a very serious sexual assault charge with high cash bail, so any stress or anxiety that would fall to this case would be minimal, de minimis at best, so I give zero weight to Mr. Guerra's perceived anxiety or uncertainty about a misdemeanor case, especially in light of a quarter million cash bail on a sexual assault charge.
>
> And the issue of prejudice of the trial, well, the truth is, when cases gets delayed, it's the prosecutor's case who gets weakened. If witnesses can't remember anything or don't have facts, then the jury has no facts to find someone guilty. So in my experience, the delay of the case works to the benefit of the defendant when the State can't meet the burden of proof. And Mr. Guerra hasn't claimed that he has amnesia, that he can't remember anything, so he can testify. He's got his memory. He can get up there and tell the jury what he wants the jury to know, and it's the State's problem if the witness that they call doesn't remember anything. So I don't see any

> prejudice falling to the defendant in this case because there's no oppressive pretrial incarceration. His anxiety concern is nonexistent for this case. There is no way the defense has been limited or weakened by the delay.
>
> And in conclusion, the trial date looks like it's pretty firm. He'll get his trial, and if he's convicted, well, that will be added to the list of potential numbers for impeachment should he testify in the sexual assault trial. I mean, I personally would rather try this case after the sexual assault trial, but the parties want it done first, so, great, we'll do it. I'll try this case. I've been trying to get it tried all along.
>
> And I should also add for the record that since we came out of COVID, I have tried more cases in the last eight, nine months than my whole career in any time window, so this last eight, nine months has been really hard on staff, and we've done a yeoman's job to dig out of COVID and try old cases. So Mr. Guerra just needs to be patient, and I find no denial and no basis for his denial of a right to speedy trial under the circumstances, and the Court prioritizing older, more serious cases, DCs in the jail just have to wait, and it's a fact of life. So the motion is denied. Trial stays on as is unless the defendant and his sexual assault attorney thinks they should wait, but I haven't heard that, so we're on.

(108:10-13; App.174-177).

Guerra then had his trial on February 17, 2022. (96:1). Ultimately he was convicted on all counts, and the court imposed a total of one and a half years initial confinement followed by six months extended supervision. (82:1-2).

C. Applicable law.

The Federal and State Constitutions guarantee a defendant the right to prompt resolution of criminal charges. The Sixth Amendment to the United States Constitution provides "In all criminal prosecutions, the accused shall enjoy the right to a speedy. . . trial". U.S. Const. amend VI. This constitutional requirement is applied to the State through the Fourteenth Amendment. *Barker v. Wingo,* 407 U.S. 514, 515, 33 L.Ed. 2d 101, 92 S.Ct. 2182 (1972). In addition, the Wisconsin Constitution, art. I, Section 7, provides that, "In all criminal prosecutions the accused shall enjoy the right . . . in prosecutions by indictment, or information, to a speedy public trial". WI Const. article I, Section 7. If one's constitutional right to a speedy trial was violated, the charges much be dismissed. *State v. Urdahl,* 2005 WI App 191, P11, 286 Wis.2d 476, 704 N.W.2d 324.

When a defendant asserts a violation of his constitutional right to a speedy trial, the court uses a four-part balancing test; however, none of the four factors in of themselves is a necessary condition to make a finding that one's right to speedy trial was violated. *Barker v. Wingo,* 407 U.S. 514 at 533. First, it considers the length of delay. *Id.* at 530. This first factor, length of delay, is a triggering mechanism used to determine whether the delay is presumptively prejudicial. *State v. Urdahl,* 2005 WI App 191 at P12. A post-accusation delay is considered to be presumptively prejudicial when it approaches one year. *Id.* It is only necessary to inquire into the other factors when a delay is presumptively prejudicial. *State v. Borhegyi,* 22 Wis.2d 506, 510, 588 N.W.2d 89 (Ct. App. 1998).

The second factor is the reason for the delay. *State v. Urdahl,* 2005 WI App 191 at P26. The court has elaborated:

> A deliberate attempt by the government to delay the trial in order to hamper the defense is weighted heavily against the State, while delays caused by the government's negligence or overcrowded courts, though still counted, are weighted less heavily. On the other hand, if the delay is caused by something intrinsic to the case, such as witness unavailability, that time period is not counted. Finally, if the delay is caused by the defendant, it is not counted.

Id. at P26. Further, 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. *Green v. State,* 75 Wis. 2d 631, 638, 250 N.W.2d 305 (1977).

The third factor is the defendant's assertion of his right. *Barker v. Wingo,* 407 U.S. 515 at 530. There is no requirement that a defendant demand a speedy trial in order to preserve the right. *Id.* at 528. However, a defendant's assertion of the right to a speedy trial is given strong evidentiary weight in determining whether the right has been violated. *Id.* at 531-532.

The fourth factor is prejudice by the delay in bringing the defendant to trial. *Id.* at 530. In accessing prejudice, the court should examine three interests the speedy trial right was designed to protect: "prevention of oppressive pretrial incarceration, prevention of anxiety and concern by the accused, and prevention of impairment of defense." *State v. Urdahl,* 2005 WI App 191 at P34. Our United States Supreme Court has added that even if the accused is not incarcerated prior to trial, he is disadvantaged by living under a cloud

of anxiety, suspicion, and often hostility. *Barker v. Wingo,* 407 U.S. 514 at 533.

D. The defendant's motion to dismiss should have been granted because his constitutional rights to speedy trial were violated.

The defendant filed a motion to dismiss. (53:1; App.159). In furtherance, the defendant argued his constitutional rights to a speedy trial were violated. (53:1-6; App.159-164). This motion should have been granted.

As noted above, this Court utilizes a four-part balancing test. First, it considers the length of delay. Here, the defendant was charged on May 1, 2020, and he did not get a trial until February 17, 2022. (2:1-2; App.101-102; 96:1). This is approximately 21 and a half months later. As provided above, a post-accusation delay is considered to be presumptively prejudicial when it approaches one year. *State v. Urdahl,* 2005 WI App 191 at P12. Considering such, the delay is presumed prejudicial, and this factor weighs against the State.

The second factor is the reason for the delay. *Id.* at P26. Further, as provided earlier:

> A deliberate attempt by the government to delay the trial in order to hamper the defense is weighted heavily against the State, while delays caused by the government's negligence or overcrowded courts, though still counted, are weighted less heavily. On the other hand, if the delay is caused by something intrinsic to the case, such as witness unavailability, that time period is not counted. Finally, if the delay is caused by the defendant, it is not counted.

Id. at P26. Further, 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. *Green v. State,* 75 Wis. 2d 631 at 638.

Here, the clock started on May 1, 2020, when the defendant was charged. (2:1; App.101). On May 26, 2020, he was brought back to court for a plea/sentencing hearing. (110:2). This nets 26 days that should be weighed against the State.

On May 26, 2020, although the defense initially requested a trial be scheduled, after further discussion, the court indicated the case

would be set for an October date – which is a month after the scheduled trial on Guerra's other file. (110:2-3).

On August 4, 2020, the defendant filed a demand for speedy trial. (11:1; App.103). As a result, the court scheduled a plea/sentencing for August 24, 2020, and a jury trial for August 25, 2020. (14:1; App.104; 103:1; App.105). Considering such, the court didn't address the motion until it held a hearing on August 24, 2020. (103:1; App.105). This nets 21 days that should be weighed against the State.

On August 21, 2020, the State filed a motion to reschedule the trial because one of its witnesses scheduled a training conference the same day as the trial. (14:1; App.104). In said motion, the State noted the defendant's speedy trial demand was moot because he was also held on another case. (14:1; App.104).

On August 24, 2020, the court addressed the State's motion. (103:4; App.108). At that time, the State indicated the speedy trial demand is not applicable since he was held on another matter. (103:2-3; App.106-107). The defense objected. (103:4; App.108). After hearing such, the court stated "The Court appreciating that the defendant has a far more serious felony case with very high cash bail and noting, as a mater of law, that he is not in custody for this case before the Court, so those factors do minimize any violation of the speedy trial statute, and further I find good cause exists by the State's motion, given the prepaid training, which the Court appreciates is necessary for job responsibilities, and therefore, the State's motion is granted." (103:4; App.108). It then canceled the trial, and it set a new trial date for November 10, 2020. (103:4; App.108; 53:1; 159:1). Ultimately, though, it held a hearing on November 9, 2020. (104:1; App.110). Considering such, there was a cavalier disregard of the defendant's right to a speedy trial, and the dates from August 25, 2020 to November 9, 2020 nets 76 days that should be weighed heavily against the State.

On November 9, 2020, the court held a hearing. (104:1; App.110). At that time, the court noted the defendant was held on another matter, and it ordered Guerra's trial adjourned since another defendant's case took priority over this case. (104:3-4; App.112-113). It then scheduled a trial for March 4, 2021. (53:2; App.160). However, the court subsequently scheduled a hearing for March 3,

2021, and the dates of November 9, 2020 to March 3, 2021, nets 115 days that should be weighed against the State. (105:1; App.120).

On March 3, 2021, the parties appeared. (105:1; App.120). At that time, the State noted the defendant's custody was on another case, that it understood the court had other "matters on the Court's calendar", and that it would defer to the Court as to whether the trial should go forward. (105:2-3; App. 121-122). The defense stated it desired to have the trial the next day. (105:3; App.122). Nonetheless, the court adjourned again. (105:3; App.122). In doing so, it indicated:

> The Court does appreciate the guarantees for the speedy trial, although the statute does provide the remedy initially would be relief from cash bond, and since this case doesn't have cash bond, and the Court, noting the nature of the charge, penalties as alleged, and the other case is more serious, and also with the Court's calendar and with the COVID-19 operating order, there are certain priorities and congestions on the docket which makes tomorrow's trial date not viable for this case to go forward.

(105:3; App.122). The court then scheduled a trial for September 16, 2021. (53:2; App.160). Considering the above, there was a cavalier disregard of the defendant's right to a speedy trial, and the dates of March 3, 2021 to September 16, 2021 nets 198 days that should be weighed heavily against the State.

On September 16, 2021, the parties reconvened. (99:1; App.142). At that time, the State indicated it recognized there was a speedy trial demand filed, but it believed a more serious and older case took priority over this case, and it asked the court to adjourn.[1] (99:2; App.143). Defense objected, and asked the case be dismissed if not tried that day. (99:2-3; App. 143-144). After hearing this, the court noted the defendant was held on another case, and that it was giving priority to a different case. (99:3; App.144). The court then scheduled a trial for October 5, 2021. (99:4-5; App.145-146; 53:2; App.160). Considering such, there was a cavalier disregard of the defendant's right to a speedy trial, and the dates of September 16, 2021 to October 5, 2021 nets 19 days that should be weighed heavily against the State.

[1] The day before, on September 15, 2021, the State indicated it would defer to the court as to whether the trial should go forward the following day, but it noted "at this point there are other cases on perhaps more serious and also older". (107:2; App.139).

On October 5, 2021, the parties appeared. (101:1; App.153). At that time, the State noted it believed another case had higher priority, and it asked the Court to reschedule Guerra's trial.[2] (101:2-3; App. 154-155). The defense indicated it was previously informed the trial was not happening that day, and he asked that the case be dismissed. (101:3; App.155). In reply, the State argued the defendant's motion is moot since he was not in custody on this case, and that dismissal is not an appropriate remedy. (101:3-4; App.155-156). After hearing this, Court noted the defendant was held on a different matter, there would be no prejudice, it had a congested calendar, and it scheduled a trial for February 17, 2022. (96:1; 101:4-5; App.156-157). Considering this, there was again a cavalier disregard of the defendant's right to a speedy trial, and the dates of October 5, 2021 to February 17, 2022, nets 136 days that should be weighed heavily against the State.

In total, 21 months and 17 days elapsed from the date the State charged Guerra to the date he finally received his trial. As noted above, the presumption is any time over 12 months is prejudicial. Here, 591 days or approximately 19 and a half months should be weighed against the State – with most of that weighed heavily. Considering such, this factor weighs against the State.

The third factor the Court considers is the defendant's assertion of his right to a speedy trial. *Barker v. Wingo,* 407 U.S. 515 at 530. Here, there is no argument the defendant did not assert said right. On August 4, 2020, the defendant filed his demand for a speedy trial. (11:1; App.103). On August, 24, 2020, the defense objected to the trial getting adjourned. (103:4; App.108). On November 9, 2020, the defendant indicated he maintained his speedy trial demand even though the court again adjourned the trial. (104:2; App.111). On March 3, 2021, the defense stated its desire to have the trial next day. (105:3; App.122). On June 4, 2021, the defense filed a motion to dismiss due to his speedy trial rights being violated. (38:1; 40:1; App.125). On September 15, 2021, the defense indicated it wanted to try the case the next day. (107:3; App.140). On September 16, 2021, the defense indicated it was ready to try the case that day; if not, it renewed his request for dismissal due to his right to a speedy trial being violated. (99:2-3; App.143-144). On October 4, 2021, the

[2] The day before, on October 4, 2021, the State indicated it believed that another case had higher priority over this case, and it deferred to the court whether the trial should be adjourned. (100:2-3; App.149-150).

defense indicated it previously filed a speedy trial demand, and that it was ready to proceed the next day. (100:3; App.150). On October 5, 2021, defense counsel noted he was previously informed the trial was off the calendar, and he argued he believed the case should be dismissed "on speedy trial grounds". (101:2-3; App.154-155). On January 6, 2022, the defendant filed another motion to dismiss. (53:1; App.159). Considering such, Guerra made his assertion clear as can be. This factor weighs heavily against the State.

Finally, the fourth factor is prejudiced by the delay in bringing the defendant to trial. *Id.* at 530. In accessing prejudice, the court examines three interests the speedy trial right was designed to protect: "prevention of oppressive pretrial incarceration, prevention of anxiety and concern by the accused, and prevention of impairment of defense." *State v. Urdahl,* 2005 WI App 191 at P34..

As for prevention of oppressive pretrial incarceration, the defense concedes this factor weighs in favor of the State. Although he was held on this case because he did not sign a signature bond, he was given a signature bond, and he was also held on another case. (5:1; App.181; 102:2; 108:6-7; App.170-171).

As for prevention of anxiety and concern by the accused, this factor is relevant. Initially, Guerra was facing disorderly conduct with a repeater enhancer; this meant he was facing up to two years imprisonment. (2:1; App.101). When Guerra moved for a speedy trial, the court even acknowledged the exposure to the charge can be stressful and anxiety provoking. (106:6; App.136). Months later, the State added two counts and tripled his exposure to six years incarceration. (26:1; App.116). Thus, the stress and anxiety would have been present. As our United States Supreme Court has stated, even if the accused is not incarcerated prior to trial, he is disadvantaged by living under a cloud of anxiety, suspicion, and often hostility. *Barker v. Wingo,* 407 U.S. 514 at 533

Guerra also wants to address the trial court's reasoning when it was asked in February of 2022, for a final time, to address the defendant's renewed motion to dismiss. At that time, again after the charges had tripled, the court changed its thoughts and now determined Guerra's anxiety concern "is nonexistent for this case" or "de minimis at best". (108:6, 11-12; App.170, 175-176; 26:1; App.116). In doing so, it reasoned that he was also held on the "serious" 19CF541 case. (108:6, 11-12; App. 170, 175-176). It

should be noted though that same case was in existence when it earlier stated the one charge can be stressful and anxiety provoking. (108:6, 11-12; App.170, 175-176).

Guerra wants to point out two additional things. First, the fact there was a more serious case in of itself does not prove Guerra would have no concern or anxiety over this case. First, he must be convicted on that case. Perhaps the State's case was not strong, and/or Guerra believed he had a good defense.[3] Second, even if Guerra was convicted, it does not necessarily mean a conviction or convictions on that case meant a long sentence or imprisonment until Guerra's expected life expired should have been expected. Further, without a long sentence or until Guerra's expected life should have expired, this case would be relevant since any conviction or convictions could result in consecutive time to the more serious case. Thus, this case would have been relevant to Guerra and there would have been reason to have stress and anxiety awaiting determination on these cases.

Finally, as for prevention of impairment of defense, this factor is also relevant. As Guerra previously noted in his motion, his defense at trial was self-defense. (53:5; App.163). Further:

> None of the evidence available contains audio evidence of the incident in question. The statements of the parties are integral to Guerra's defense, and it is unreasonable that any parties involved would be able to recall specific statements made almost two years ago.

(53:5; App.163). As Guerra understood at that time, the importance of the memory of these details was important and there was concern of those memories fading every occasion the trial court canceled and rescheduled his trial. (53:5; App.163).

Considering the above, in summary, the defendant's constitutional rights to a speedy trial were violated. First, since there was over a year since he was charged until when he was provided a trial, the delay is presumptively prejudicial and weighed against the

[3] A copy of the judgment on Fond du Lac County Case 19CF541 is not in the record of this case; however, the records for that case on the Consolidated Court Automation Programs website (CCAP) indicate that the case was dismissed on June 13, 2022. (App.182). This court should take judicial notice of that adjudicative fact under Wis. Stat. § 902.01(2)(b) and (4). See *Kirk v. Credit Acceptance Corp.,* 2013 WI App 32, ¶5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522 (CCAP is an online website that contains information entered by court staff of which this court may take judicial notice).

State. Second, since most of the delay was not only attributed to the State, but heavily attributed based upon the cavalier position that was taken towards his speedy trial rights, this factor weighs against the State. Third, the defendant made it very clear on numerous occasions that he was asserting his right to a speedy trial; thus, this factor also weighs heavily against the State. Finally, as for prejudice, this was also present primarily by the anxiety and stress of having the case hanging over him and the importance of the memories of the witnesses that faded over time.

CONCLUSION

For the reasons given above, Guerra requests this Court remand this case back to the trial court with directions that the judgment of conviction be vacated.

Signed:

Electronically signed by Timothy O'Connell

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FORM AND LENGTH CERTIFICATION

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 5,752 words.

Date: March 18, 2023

Signature: Electronically signed by Timothy O'Connell

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.

Date: March 18, 2023

Signature: Electronically signed by Timothy O'Connell