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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.

REPLY BRIEF OF THE DEFENDANT - APPELLANT

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REPLY BRIEF OF THE DEFENDANT - APPELLANT

In the State's brief, it argued the trial court properly denied the defendant's motion to dismiss for violating the defendant's constitutional right to a speedy trial. Brief of Plaintiff-Respondent at 23-24. As a result, this reply brief will respond to the State's argument. After doing so, it will be shown why this Court should remand this case back to the trial court with directions that the judgment of conviction be vacated.

ARGUMENT

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

Introduction.

In the State's response brief, it argued the trial court properly held a trial almost 21 and a half months after Ned Guerra (Guerra) was charged – even in light of his objections. Brief of Plaintiff-Respondent at 18, 23-24. In doing so, it blamed COVID, the court's congested calendar, and witness availability, and it argued Guerra did not suffer prejudice. *Id.* at 9-10, 19-23. Case law provides a four part test to address whether one's constitutional right to a speedy trial was violated, and this reply brief will address the four part test and show the delay was not proper, and it was not done primarily as the State argued, but rather more so due to a cavalier disregard for Guerra's constitutional right.¹

Length of delay.

As for the first part of the test, length of the delay, the State agreed it was approximately 21 and a half months from the time of the charge to the date of trial. *Id.* at 8-9. Further, per case law, it agreed that the delay is presumptively prejudicial. *Id.* Considering the State conceded the delay is presumed to be prejudicial, Guerra will not address this factor further.

Reason for the delay.

Next, the State addressed the second factor – the reasons for the delay. *Id.* at 9. In doing so, the State blamed the delays on the court's calendar, witness unavailability, and COVID, and it appeared to argue all delays should not be weighed heavily against it. *Id.* at 9-10. However, as will be shown, the delays were more so as a result of

¹ The four part test calls for the court to consider: 1) the length of delay; 2) the reason for the delay; 3) whether the defendant asserted his right; and 4) whether the delay resulted in prejudice. *State v. Borhegyi*, 22 Wis.2d 506, 509, 588 N.W.2d 89 (Ct. App. 1998).

a cavalier disregard for Guerra's constitutional right to a speedy trial, and this should be weighed heavily against it.²

Here, Guerra was charged on May 1, 2020. (2:1; App.101). On May 26, 2020, he was brought back to court for a plea/sentencing hearing. (110:2). This netted 26 days that should be weighed against the State, and it did not appear the State objected to this number. Brief of Plaintiff-Respondent at 10.

On August 4, 2020, Guerra filed a demand for speedy trial. (11:1; App.103). As a result, the court scheduled a hearing for August 24, 2020, and a jury trial for August 25, 2020. (14:1; App.104; 103:1; App.105). Considering such, the court did not address the motion until it held a hearing on August 24, 2020. (103:1; App.105). This netted 21 days that should be weighed against the State, and it did not appear the State objected to this number. Brief of Plaintiff-Respondent at 10.

On August 24, 2020, the State asked for a new trial date since its witness was unavailable, and it indicated the speedy trial demand is not applicable since Guerra was held on another matter (103:2-3; App.106-107). Guerra objected, and he asked to address its other acts motion the morning of the trial. (103:4; App.108). After hearing such, the court granted the State's request considering he was held on another case rather than this case. (103:4; App.108). It then set a new hearing for November 9, 2020, and a trial date for November 10, 2020. (103:4; App.108; 53:1; 159:1).

In the State's brief, it blamed the delay on its unavailable witness. Brief of Plaintiff-Respondent at 10. Further, it noted there was "discussion regarding a potential other acts motion and/or admission of character evidence", and that the court ultimately granted the State's request "in part" due to witness unavailability. *Id.* Thus none of the time from August 24 2020 to November 9, 2020 should count. *Id.*

In response, first, as noted above, the court did not indicate it was rescheduling "in part" due to the other acts motion. Second, the witness the State used to reschedule was Detective David Olig (Olig).

² A cavalier disregard toward a defendant's right to a speedy trial should be weighed heavily against the State. *Green v. State*, 75 Wis.2d 631, 638, 250 N.W.2d 305 (1977).

(14:1; App. 104). In reviewing the trial transcript, Olig was only used for purposes of telling the jury what he saw when he reviewed the jail rules form and the video of the incident. (96:90-107). This witness was unnecessary. Ultimately, the State could have used a correctional officer or another detective. Finally, the constitutional right to a speedy trial is not a moot point. Considering such, the reason the trial was rescheduled was because of the cavalier disregard of Guerra's right to a speedy trial, and the dates from August 25, 2020 to November 9, 2020 netted 76 days that should be weighed heavily against the State.

On November 9, 2020, the court held a hearing, it noted Guerra 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. (105:1; App.120). The dates of November 9, 2020 to March 3, 2021, netted 115 days that should be weighed against the State, and it did not appear the State objected to this number.³ Brief of Plaintiff-Respondent at 11-13.

On March 3, 2021, the parties appeared. (105:1; App.120). At that time, the State noted Guerra'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 other case is more serious, and also with the Court's calendar . . . there are certain priorities . . . 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).

³ In the State's brief, it indicated these dates "should not be weighed heavily against the State, if at all." Brief of Plaintiff-Respondent at 12-13. The State does not elaborate why it thinks it is possible these dates could not be counted, and since it ultimately does not appear to object to using the dates so long as they are weighed less heavily, the defense will not respond further.

In the state's brief, it again blamed COVID and the court's congested calendar. Brief of Plaintiff-Respondent at 13-14. However, this was not about COVID or the court's congested calendar; this was about not making a constitutional right to a speedy trial a priority, and instead putting ahead of it a case which "is more serious". Considering the above, there was a cavalier disregard of Guerra's right to a speedy trial, and the dates of March 3, 2021 to September 16, 2021, which netted 198 days, 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. (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 Guerra 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).

In the State's brief, it again blamed the court's congested calendar. Brief of Plaintiff-Respondent at 14-15. However, again, this was not about the court's congested calendar; this was about the State and the court not making a constitutional right to a speedy trial a priority, and instead putting ahead of it an older case in light of the fact Guerra was given a signature bond. (99:3). Considering the above, there was a cavalier disregard of Guerra's right to a speedy trial, and the dates of September 16, 2021 to October 5, 2021 netted 19 days that should be weighed heavily against the State.

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. (101:2-3; App. 154-155). The defense indicated it was previously informed the trial was not happening that day, and asked that the case be dismissed. (101:3; App.155). In reply, the State argued Guerra'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, the Court noted Guerra 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).

In the State's brief, it again blamed the rescheduling on COVID and the court's congested calendar, and it argued the days from October 5, 2021 to February 17, 2022 should be weighed less heavily. Brief of Plaintiff-Respondent at 16-17. However, again, this was not about COVID and a busy calendar, this was about not making a constitutional speedy trial right a priority. Considering this, there was again a cavalier disregard of Guerra's right to a speedy trial, and the dates of October 5, 2021 to February 17, 2022, netted 136 days that should be weighed heavily against the State.

In summary, the extensions were not because of COVID and a congested calendar. The delays were as a result of a cavalier disregard for Guerra's constitutional right to a speedy trial. As addressed earlier, as Guerra was asserting his right to a speedy trial, instead of taking steps so that Guerra's right was honored, the State showed little regard to making such right a priority. Instead, it time and again informed the court it did not have to give Guerra a speedy trial because he was given a signature bond, it believed other cases were more important because they were older or more serious, and it even asked for extension for a witness who it could have replaced. The trial court in turn granted the delays for reasons essentially provided by the State.

Ultimately, a constitutional right to a speedy trial should mean something. Disregarding said right simply because one is given a signature bond, or because there is an older case, should not be tolerated; defendants whom assert said right should get priority. In total, 21 months and 17 days elapsed from the date the State charged Guerra to the date he finally received his trial. 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 defendant asserted his right.

As for the third part of the test, whether Guerra asserted his right, the State argued some of the blame should be put on Guerra since he was charged on May 2, 2020, but did not make a request for a speedy trial until August 4, 2020, and a hearing was not held until August 24, 2020. Brief of the Plaintiff-Respondent at 18. Overall, though, it does not appear the State contests this factor weighs in favor of Guerra. Likely for good reason. Here, by August 4, 2020,

Guerra demanded his speed trial, and continued asserting that right up to his trial. (11:1; App.103); (103:4; App.108); (104:2; App.111); (105:3; App.122); (38:1; 40:1; App.125); (107:3; App.140);(99:2-3; App.143-144); (100:3; App.150; (101:2-3; App.154-155); (53:1; App.159). Considering such, this factor weighs heavily in favor of Guerra.

Prejudice to the defendant.

The fourth factor the court considers is prejudice. *Barker v. Wingo*, 407 U.S. 514, 515, 33 L.Ed. 2d 101, 92 S.Ct. 2182 (1972). In determining 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.” *Id.* at 532.

As for prevention of oppressive pretrial incarceration, the defense concedes this factor. 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, the State cited to the trial court’s comments from June 17, 2021, where it indicated the charges can be stressful – but that the signature bond mitigates the stress, and then on February 11, 2022, where it indicated there would be minimal to no stress or anxiety because he was not held on this case but rather a more serious case. Brief of Plaintiff-Respondent at 20-21; (106:5-6; 108:11-12).

In response, this analysis disregarded case law. In *Barker*, the United States Supreme Court 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. The trial court initially appreciated this concern when it stated the exposure to the charge can be stressful and anxiety provoking. (106:6; App.136). Notably, the anxiety would have grown larger when 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.

Further, as Guerra noted in his initial brief:

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.⁴ 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.

Brief of Defendant-Appellant at 15.

Finally, as for prevention of impairment of defense, the State wrote it did not believe the delays weakened Guerra's case. Brief of Plaintiff-Respondent at 21-23. However, 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 rescheduled his trial. (53:5; App.163). The mere fact that a witness did not testify he could not recall is not conclusive; there are facts that one simply forgets over time that he will not remember he forgot.

Summary.

In balancing the factors, the first factor, presumptive prejudice is conceded by the State, the third factor, assertion of Guerra's right, is heavily weighed in favor of Guerra, and the fourth factor, prejudice, is not weighed as heavily in favor.

⁴ In the defendant's brief, he asked the court to take judicial notice that this more serious case was ultimately dismissed. Brief of Defendant-Appellant at 15.

It is the second factor, though, the reason for the delay, that is most troubling. This was not about the court's congested calendar when it delayed his trial for approximately 21 and a half months. It was about the cavalier disregard for Guerra's right to a speedy trial. When a defendant makes a demand for speedy trial, the parties and court should make it a priority, and make every effort to make sure it happens. Here, in determining the delays, the assumption was that a signature bond makes a speedy trial demand a moot point, and that this case can take a back seat to other older or more serious cases. As previously provided:

While we are reluctant to use such an extreme remedy as dismissal of the charges against a defendant who has been convicted of serious criminal conduct, we are left with no alternative. A defendant's right to a speedy trial is meaningless if the State is permitted to cavalierly ignore a demand for prompt resolution of the charges and delays bringing a defendant to trial for seventeen months. The constitutional right of a speedy trial cannot be so cavalierly disregarded by the State in scheduling criminal trials.

State v. Borhegyi, 222 Wis.2d 506 at 520.

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.

June 15, 2023

Signed:

Electronically signed by Timothy O'Connell

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CERTIFICATION AS TO FORM/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 produced with a proportional serif font. The length of this brief is 2,999 words.

Date: June 15, 2023

Signature: Electronically signed by Timothy O'Connell

CERTIFICATION 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: June 15, 2023

Signature: Electronically signed by Timothy O'Connell