

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 18, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP367-CR

Cir. Ct. No. 2005CF508

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN JAY JOBSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Rock County:
JAMES P. DALEY, Judge. *Affirmed.*

Before Higginbotham, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. John Jay Jobson appeals an order dismissing his prosecution on three charges without prejudice. Jobson contends that the trial court's decision not to attach prejudice to the dismissal is an erroneous exercise of its discretion. We disagree, and therefore affirm.

¶2 In October 2004 the State charged Jobson with operating while intoxicated and operating with a prohibited blood alcohol concentration, both as a fifth or subsequent offense, and with operating after revocation. The case was dismissed, and the State refiled the charges in February 2005. In April 2005 Jobson, then serving an unrelated prison sentence, moved for prompt disposition of the charges under WIS. STAT. §§ 971.11(1) & (2) (2005-06),¹ triggering a 120-day period to bring him to trial. However, Jobson's initial appearance on the February complaint did not occur until October 5, 2005. Jobson subsequently moved for dismissal based on the failure to speedily dispose of his case.

¶3 In September 2006 the trial court found that Jobson's right to a speedy disposition under WIS. STAT. § 971.11 was violated, but refused to dismiss the case, relying on its determination that the delay in bringing him to trial did not substantially prejudice him. We accepted review of that decision and held that a violation of § 971.11 required dismissal of the complaint, with the court's discretion limited to determining whether the dismissal should be with or without prejudice. We therefore reversed the order denying dismissal, and remanded for entry of an order granting dismissal, and for a determination whether the dismissal should be with or without prejudice, giving due consideration to the factors identified in *State v. Davis*, 2001 WI 136, ¶29, 248 Wis. 2d 986, 637 N.W.2d 62. Those factors include: whether the State could have adequately prepared within 120 days; the defendant's contribution to the delay; whether the defendant waived the right to speedy disposition; the harm to the defendant such as anxiety and

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

concern; the harm to the defense; the effect of the delay on sentencing concerns; the public interest; and the effect of the decision on the victim. *See id.*

¶4 On remand the court considered the *Davis* factors in detail, and found that some favored Jobson, while others favored the State. Essentially, the court found that while the State bore responsibility without good cause for the initial four month delay that caused the statutory violation, Jobson suffered few if any adverse effects from that relatively brief delay. Although the subsequent, much longer delays did, in fact, cause him significant prejudice, the court found that those delays were attributable to Jobson, and were not the State's responsibility. On balance, the court concluded that Jobson had not demonstrated sufficient prejudice from the delay attributable to the State to warrant dismissal with prejudice.

¶5 Jobson contends on appeal that, under *Davis*, “[i]f the State fails to provide good cause for failing to comply with the statutory deadline, dismissal with prejudice should occur as a matter of law.” We disagree. *Davis* merely recognizes the court's discretion to dismiss with prejudice. It sets forth no conditions under which dismissal with prejudice is mandatory. We affirm a discretionary decision if the court considers the facts of record under the relevant law and reasons its way to a rational conclusion. *See id.*, ¶28. That is what the court did in this case. It considered the full range of factors set forth in *Davis*, applied them to the facts of the case, and reached a fully explained, reasonable conclusion.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

