COURT OF APPEALS
DECISION
DATED AND FILED

January 11, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP130-CR **Cir. Ct. No. 2010CM68**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

LEON A. WEDDE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Green Lake County: W. M. McMONIGAL, Judge. *Reversed and cause remanded with directions.*

¶1 BROWN, C.J.[1] The State in this case appeals the denial of its motion to dismiss *without* prejudice followed by the granting of a defense motion

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statute are to the 2009-10 version unless otherwise noted.

to dismiss *with* prejudice. The State contends that (1) the trial court improperly denied its motion to dismiss without prejudice because it did not adequately consider the public interest when doing so, and (2) the trial court improperly dismissed with prejudice because no jury had been called and therefore jeopardy had not attached. We agree that the trial court erred in denying the motion to dismiss without prejudice because it failed to apply the proper legal standard of considering the public interest. And while we do not rest our decision on the second issue, we do discuss it with regard to the remand. We reverse and remand, with directions.

¶2 Wedde was charged with misdemeanor battery, disorderly conduct, and criminal trespass, all as a repeater. The initial appearance was June 7, 2010, and a jury trial was set for November 17, 2010. The trial court chose to adjourn the trial and try a different case on that date. Then, on November 22, the court issued notice that the matter was rescheduled for December 9. According to the State's brief, the prosecutor handling the case did not receive the notice until November 29 due to her work schedule and the Thanksgiving holiday.

¶3 On November 30, the State filed a motion for a continuance. The trial court denied the request the day it was filed. On December 6 and 7, the State filed a supplemental motion for continuance and motion to dismiss without prejudice. On December 7, the court held a hearing and denied the motion for continuance and the motion to dismiss without prejudice.

¶4 At the hearing on December 7, the trial court expressed its reasons for denying the State's motion to dismiss without prejudice. It explained that it felt that the State's November 30 motion in response to notice sent on November 22 was not timely in the context of a case that had been rescheduled for trial

December 9. It emphasized that the case was trial ready on November 17, it was not terribly complex, and a continuance could mean waiting months before the next available trial date, which could jeopardize the trial-ready status of the case, as well as inconvenience the victim. The court also noted the victim's apparent reluctance to testify. The trial court acknowledged that the only way to dismiss with prejudice would be to call the jury on December 9 and then, if the State was in fact not prepared to prove its case, hear Wedde's motion to dismiss with prejudice. It stated its intention to do just that.

¶5 The State repeatedly emphasized that it would not be ready or able to proceed on December 9. Eventually, after it became clear the judge would not be persuaded and the case would proceed to trial as scheduled, and because the State did not want the county going to unnecessary expense of calling a jury, it agreed to stipulate that if the jury was called, jeopardy would attach and the State would not be prepared to prove its case.[2] It stated that it would appeal the denial of its motion to dismiss without prejudice. The State now appeals on the grounds that the trial court erred in granting the motion to dismiss with prejudice as well as error in denying the motion to dismiss without prejudice.

¶6 We first address the State's argument that the trial court erroneously exercised its discretion in denying its motion to dismiss without prejudice. We will affirm a discretionary decision if the trial court examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***State v. Kleser***, 2010

[2] We hardly think that this stipulation was voluntarily and freely entered into by the State.

WI 88, ¶37, 328 Wis. 2d 42, 786 N.W.2d 144. For the proper standard of law, the State points us to ***State v. Kenyon***, 85 Wis. 2d 36, 45, 47, 270 N.W.2d 160 (1978), which held that the trial court in that case had the authority to deny the prosecutor's motion to dismiss without prejudice, but erroneously exercised its discretion because of its failure to adequately consider the public interest. More specifically, the ***Kenyon*** court explained that

> The requirement that a ruling be "in the public interest" logically envisages some consideration of the effect of dismissal or refusal to dismiss on the general welfare. It would be impossible to make an exhaustive list of just what to take into account in this regard. Relevant factors would necessarily be keyed to the specifics of each case. However, in all cases some finding should be made with respect to the impact of the ruling on the public interest in proper enforcement of its laws and the public interest in allowing the prosecutor sufficient freedom to exercise his [or her] legitimate discretion ….

Id. at 46-47. The State argues that the trial court did not consider the public interest when it denied the motion to dismiss without prejudice in this case.

¶7 We initially note that the trial court appeared to have touched on some of the factors that a court might consider while discussing the public interest involved. The trial court talked about the impact of the possible delay of a trial-ready case on the victim, the seriousness of the crime (misdemeanor battery as opposed to a more serious offense), and the victim's apparent lack of commitment to testifying against the defendant. The trial court also appeared to take issue with the way the district attorney was managing his office—criticizing the way in which the district attorney made assignments in this case. The problem is that the trial court appears to have had the wrong standard in mind when it denied the motion to dismiss without prejudice. It expressly stated that this was "a matter of the Court balancing the interests of the State and the interests of the

defense." It later referenced this balancing test a second time. It then denied the continuance and the motion to dismiss without prejudice together, in one sentence, without stating separate reasons for the two. In other words, the trial court appears to have equated the decision, and by extension the law, regarding continuances with the motion to dismiss without prejudice. The court never discussed the extent of the public's interest in having this crime actually prosecuted. And while the court did allude to the defendant's reluctance to testify, that came about as a result of a brief comment made by the defense attorney, without corroboration or further investigation. Without more, we cannot assign any serious weight to this. In sum, the trial court did not discuss the public interest.

¶8 It is obvious when reading the transcript that the trial court viewed the State's motion to dismiss without prejudice as a blatant attempt to get around the denial of its motion for a continuance, and we can understand the trial court's point of view. But that precise rationale was discussed by our supreme court in ***State v. Braunsdorf***, 98 Wis. 2d 569, 585-86, 297 N.W.2d 808 (1980). In that case, the defendant argued that, in situations where a previous motion for continuance has been denied, the subsequent granting of a motion to dismiss without prejudice would mean that the State got what it wanted—not having to try the case on the date scheduled, thus amounting to a continuance. ***Id.*** at 576. The supreme court rejected that argument, reasoning that more work is involved in reissuing a case that has been dismissed without prejudice than in proceeding with a case after a continuance is granted. *See* ***id.*** In other words, the State would have to start from scratch if the case were dismissed without prejudice whereas the State could pick up where it left off if granted a continuance.

¶9 The defendant in ***Braunsdorf*** next pointed out that if a motion to dismiss without prejudice is denied, thus forcing a case to trial when the State is

not prepared to proceed, the resulting trial would be a "sham" or "hollow ritual." ***Id.*** at 576-77. The supreme court also rejected that argument. In so doing, it pointed out that a district attorney is primarily answerable to the people. Because of that, it stated that "[i]t would be inappropriate for a trial court, by means of a pretrial dismissal with prejudice, to insulate a district attorney from accountability for the manner in which he fulfills his public trust." ***Id.*** at 577. "If a criminal prosecution fails for lack of prosecutorial diligence, it is the district attorney's responsibility. *The court should not intercede unless the defendant's right to a speedy trial is denied.*" ***Id.*** (emphasis added).

¶10 Based on ***Kenyon*** and ***Braunsdorf***, we reverse and remand to the trial court with the following directions. We understand that the trial court judge who presided in this case beforehand has retired. So, on remand, there are some options available. A new date for trial may be set by the successor trial court if the State withdraws its motion to dismiss. Or, the State may wish to proceed with its motion to dismiss without prejudice. If the latter course of action is taken, the successor court may either grant or deny the State's motion to dismiss without prejudice after considering the public's interest to have the crimes actually committed fairly prosecuted and to the protection of the rights of third persons. *See* ***Kenyon***, 85 Wis. 2d at 47. In the event the trial court decides to deny the motion to dismiss without prejudice, the case must then be set for trial on a date certain. ***Braunsdorf*** mandates that the court may not dismiss with prejudice even if the State says it will not be ready to proceed to trial on the scheduled date. Rather, the case must proceed to trial and jeopardy must attach. *See* ***Braunsdorf***, 98 Wis. 2d at 576-77.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.