COURT OF APPEALS
DECISION
DATED AND FILED

August 11, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1156-CR **Cir. Ct. No. 2014CF388**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

CORTEZ D. BRITTON,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Columbia County: ALAN J. WHITE, Judge. *Reversed and cause remanded with directions*.

Before Kloppenburg, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. The State of Wisconsin appeals from an order dismissing the State's criminal complaint against Cortez Britton with prejudice. Because we conclude that the circuit court lacked the authority to dismiss with prejudice, we reverse and remand to the circuit court for further proceedings.

BACKGROUND

¶2 Britton was charged with possession with intent to deliver THC (Tetrahydrocannabinols) less than or equal to 200 grams as party to a crime, a felony, and possession of drug paraphernalia as a party to a crime, a misdemeanor. Britton made an oral demand for speedy trial at his arraignment on February 19, 2015, and filed a written demand for speedy trial on February 20, 2015. The written demand for speedy trial referenced both constitutional and statutory grounds, but both parties have proceeded in this appeal, and reaffirmed at oral argument, that the matter should be considered solely under WIS. STAT. § 971.10 (2013-14),[1] the speedy trial statute. Under WIS. STAT. § 971.10(2)(a), the trial of a defendant charged with a felony must commence within 90 days.[2]

¶3 The circuit court scheduled trial to commence on April 30, 2015. The State failed to obtain necessary testing of evidence from the state crime laboratory. On the day before trial was scheduled to begin, April 29, 2015, the State informed the court that, because the testing had not been done, the State was unable to prove the charges beyond a reasonable doubt at that time and moved for dismissal. In the proposed order drafted by the State, which appeared on the same document as the motion, the State indicated that dismissal was to be without prejudice. In ordering dismissal, the circuit court decided that the failure of the State to be ready for trial was "egregious," and that it was necessary to dismiss

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] WISCONSIN. STAT. § 971.10(2)(a) states in relevant part: "The trial of a defendant charged with a felony shall commence within 90 days from the date trial is demanded by any party in writing or on the record."

with prejudice in order to protect Britton's right to speedy trial. Consequently, in its oral decision, the court determined that the dismissal should be with prejudice. The court altered the proposed written order accordingly. The State appeals. Because the matter turns on an issue of law, the facts will not be discussed in greater detail, except as needed in the discussion below.

DISCUSSION

¶4 The State argues that the circuit court lacked authority to dismiss the State's complaint against Britton with prejudice under these circumstances. Whether a court has authority in an area presents a question of law, which we review de novo. *See* ***Wisconsin Dept. of Workforce Dev. v. LIRC,*** 2016 WI App 21, ¶7, 367 Wis. 2d 609, 877 N.W.2d 620. This case also involves an issue of statutory construction. Statutory construction is a question of law that is also subject to our de novo review. ***State v. Cole***, 2000 WI App 52, ¶3, 233 Wis. 2d 577, 608 N.W.2d 432.

¶5 To determine whether the circuit court lacked authority to dismiss with prejudice in this case, we first examine whether the speedy trial statute, WIS. STAT. § 971.10, permits such a remedy when the State moves for dismissal under these circumstances. We then turn to the question of whether the circuit court has any other authority to dismiss the action with prejudice if the State moves for dismissal without prejudice under these circumstances. On this second question, we conclude, applying ***State v. Braunsdorf***, 98 Wis. 2d 569, 572, 297 N.W.2d 808 (1980), that the circuit court has no authority to dismiss with prejudice prior to the attachment of jeopardy under these circumstances, putting aside a violation of the constitutional right to speedy trial, which Britton does not claim here.

A. Dismissal is Not a Remedy under WIS. STAT. § 971.10

¶6 In interpreting a statute, we first look to the plain language of the statute itself. ***Lake City Corp. v. City of Mequon,*** 207 Wis. 2d 155, 162, 558 N.W.2d 100 (1997). If the meaning is clear from the statutory language, we are prohibited from looking beyond such language to ascertain its meaning. ***Id*** at 163. We give deference to the policy considerations made by the legislature in enacting the law. ***State v. Warbelton,*** 2008 WI App 42, ¶13, 308 Wis. 2d 459, 747 N.W.2d 717. "Under the doctrine of *expressio unius est exclusion alterius,* 'the express mention of one matter excludes other similar matters [that are] not mentioned.'" ***FAS, LLC v. Town of Bass Lake***, 2007 WI 73, ¶27, 301 Wis. 2d 321, 733 N.W.2d 287 (quoted source omitted).

¶7 The plain language of WIS. STAT. § 971.10 provides one statutory remedy, and one statutory remedy only, when trial does not commence within the time limits: "Every defendant not tried in accordance with this section shall be discharged from custody…." WIS. STAT. § 971.10(4). This language establishing the statutory remedy is plain and unambiguous.

¶8 In an attempt to show that the plain meaning of the statute is superseded by an existing precedential supreme court opinion, Britton argues that we should be persuaded by ***State v. Davis***, 2001 WI 136, ¶27, 248 Wis. 2d 986, 637 N.W.2d 62, that the circuit court has the discretion to dismiss either with or without prejudice. Britton's reliance on ***Davis*** is misplaced.

¶9 ***Davis*** did not involve the speedy trial statute. ***Davis*** arose under the Prompt Disposition of Intrastate Detainers statute, WIS. STAT. § 971.11. Unlike in WIS. STAT. § 971.10, the remedy provided in § 971.11 for failure to meet the time deadline *is* dismissal. *See* WIS. STAT. § 971.11(7). However, whether the

dismissal under § 971.11 should be with prejudice or without prejudice is not specified in § 971.11, and our supreme court held in ***Davis*** that, by not specifying whether the dismissal is with or without prejudice, the legislature left the decision to the discretion of the circuit court. ***Davis***, 248 Wis. 2d 986, ¶14. Thus, the case is distinguished not only because it involves a different statute, but because that statute involves a different remedy from that provided in § 971.10,[3] and we therefore conclude that the reasoning in ***Davis*** is not applicable here.

¶10 Britton does not direct this court to any other statutory or other legal authority indicating that any remedy other than the one specified by the plain language of WIS. STAT. § 971.10, release of the defendant from custody, is available under § 971.10, and our own review has disclosed none. Accordingly,

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[3] The supreme court in ***Davis*** explicitly identified the difference in the statutes:

> Because WIS. STAT. § 971.11(2) states that it is subject to [WIS. STAT.] § 971.10, we must read §§ 971.10 and 971.11 together. Under [] § 971.10(4), if the State fails to meet the statutory speedy trial time periods and has not been granted a continuance, the accused is discharged from custody to the detriment of the State and to the benefit of the accused. On the other hand, an accused cannot be discharged from custody as a consequence of the State's failure to bring a criminal case on for trial in the context of § 971.11, because the accused subject to § 971.11 is incarcerated for committing another crime. However, the concept that failing to meet a statutory time period imposes a disadvantage on the State and grants a benefit to an accused applies equally to both §§ 971.11 and 971.10.
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> The detriment/benefit objective can be achieved in WIS. STAT. § 971.11(7) by allowing a circuit court to dismiss a criminal case with prejudice when no good cause is shown for the State's failure to comply with the 120-day time period and to dismiss a criminal case without prejudice when good cause is shown for doing so.

State v. Davis, 2001 WI 136, ¶¶16-17, 248 Wis. 2d 986, 637 N.W.2d 62.

we conclude that dismissal with prejudice is not a remedy available by the plain language of § 971.10.

¶11 In sum, we construe WIS. STAT. § 971.10 to provide no statutory authority for the dismissal of a criminal complaint with or without prejudice

B. Circuit Court does not have Discretionary Authority to Dismiss State's Complaint with Prejudice

¶12 Britton argues in the alternative that even if the circuit court lacked statutory authority to dismiss the State's complaint against him with prejudice under WIS. STAT. § 971.10, the court nevertheless has independent discretionary authority to do so under the circumstances presented here. We reject Britton's argument, because similar arguments were directly and expansively rejected in ***Braunsdorf***.

¶13 In ***Braunsdorf***, our supreme court held that "the [circuit] courts of this state do not possess the power to dismiss a criminal case with prejudice prior to the attachment of jeopardy except in the case of a violation of a constitutional right to a speedy trial." ***Braunsdorf***, 98 Wis. 2d at 586. Britton argues that ***Braunsdorf*** is distinguishable from the present case because the court in ***Braunsdorf*** ruled only that the circuit court lacks *inherent* power to dismiss with prejudice. Britton argues that in the case before us, the court was instead exercising discretionary authority upon the State's motion for dismissal without prejudice. As we now explain, Britton's argument reflects an incomplete reading of what the ***Braunsdorf*** opinion says about the authority of a circuit court when presented with a motion to dismiss by the State prior to jeopardy attaching and is a misstatement of the holding quoted above.

¶14 ***Braunsdorf*** discusses the discretion of prosecutors to initiate criminal proceedings, which the supreme court explains traditionally includes the discretion to voluntarily dismiss charges. ***Id.*** at 572. In Wisconsin, a prosecutor's discretionary authority to voluntarily dismiss charges is limited by "the independent authority of the [circuit] court to grant or refuse a motion to dismiss 'in the public interest.'" ***Id.*** at 574 (quoted source omitted). The supreme court stated that, in addressing a motion to dismiss a criminal complaint by the State, a circuit court's discretion is limited to either granting or denying the State's motion.

¶15 ***Braunsdorf*** establishes that, in this general context, it is only violations of the *constitutional* right to a speedy trial that can result in the dismissal of charges with prejudice, if the defendant has taken affirmative steps to bring the matter to trial. *See* ***id.*** at 575. The court states:

> Our cases make it clear that the power to dismiss with prejudice contemplated in ***Stoeckle*** is not some latent or residual power which is invoked in the presence of a constitutional speedy trial violation. Rather, it is a power implicit in the speedy trial guarantee because it is necessary to the protection of "[t]he amorphous quality of the right." Since that power exists only to safeguard a defendant's constitutional right to a speedy trial, *in the absence of statutory authority it cannot be extended to effectuate other purposes.*

Id. (internal source omitted and emphasis added).

¶16 Finally, the ***Braunsdorf*** court, having concluded that there is no statutory authority for a circuit court to dismiss a criminal complaint with prejudice, ***id.*** at 574, addressed the question of whether a circuit court has the inherent power to dismiss a complaint with prejudice. The supreme court

concluded that the circuit court does not have any such inherent power. ***Id.*** at 578-86.

¶17 The supreme court's holding, which we quote again for emphasis, is unambiguous:

> Accordingly, we hold that the [circuit] courts of this State do not possess the power to dismiss a criminal case with prejudice prior to the attachment of jeopardy except in the case of a violation of a constitutional right to a speedy trial.

Id. at 586. The supreme court, at length and explicitly, rejected the notion that circuit courts have discretionary authority, either as part of their inherent powers or otherwise, to dismiss an action with prejudice in this context when the State has not moved to do so, prior to the attachment of jeopardy and in the absence of a violation of the constitutional right to speedy trial.

¶18 In sum, under ***Braunsdorf***, a circuit court has no authority to dismiss a criminal complaint with prejudice prior to the attachment of jeopardy except in the case of a constitutional violation of the right to a speedy trial, which is not claimed here.

C. Remedy

¶19 We now turn to the matter of what remedy to employ. The parties agreed at oral argument that if dismissal with prejudice was erroneous, then the appropriate remedy would be to vacate the circuit court's order for dismissal with prejudice and return the case to the circuit court. We agree. This would return the case to its status immediately prior to that order, as best that can be accomplished by the parties under circumstances changed by the passage of time. The court would then proceed to rule upon the State's motion for dismissal without

prejudice, assuming that the State does not elect to withdraw that motion, which the court has the discretion to either grant or deny in the public interest. *See* ***id.*** at 574.

CONCLUSION

¶20 For these reasons, we reverse dismissal of the complaint with prejudice, and remand for further proceedings consistent with this opinion.

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

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