

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 6, 2026

Samuel A. Christensen
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. 2024AP522-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2023CM15

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARRY J. RUSH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Price County:
KEVIN G. KLEIN, Judge. *Affirmed.*

¶1 GILL, J.¹ Larry Rush appeals from a circuit court order dismissing his case without prejudice pursuant to the Intrastate Detainer Act (IDA). See WIS. STAT. § 971.11. On appeal, he argues that the court erroneously exercised its

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2023-24). All references to the Wisconsin Statutes are to the 2023-24 version.

discretion by dismissing the case without prejudice. For the following reasons, we affirm.

BACKGROUND

¶2 On February 6, 2023, the State charged Rush with three misdemeanor counts of receiving stolen property, and it issued a summons to Rush. On February 21, 2023, an admission of service of the criminal complaint and the summons was filed, reflecting Rush's signature dated February 15, 2023. Shortly thereafter, an attorney was appointed to represent Rush.

¶3 At Rush's scheduled initial appearance on March 28, 2023, the State noted that Rush did not appear and that he was imprisoned at the New Lisbon Correctional Facility. The circuit court adjourned the initial appearance and stated that the district attorney's office would communicate with defense counsel to schedule an initial appearance.

¶4 The initial appearance was held on April 25, 2023. Rush pled not guilty to all counts, and the circuit court set Rush's bond. In addition, the court scheduled a pretrial conference hearing for May 19, 2023. On May 22, 2023, the court issued an order scheduling the pretrial conference for June 6, 2023.²

² There is no transcript or other evidence of a hearing taking place on May 19, 2023. To the extent the hearing did not occur, there is no evidence in the record as to why it did not occur.

¶5 On May 23, 2023, Rush submitted a prompt disposition request pursuant to the IDA. The State received the request on May 30, 2023.³ On May 31, 2023, the circuit court scheduled a final pretrial hearing for September 5, 2023, and a jury trial for September 13, 2023.⁴

¶6 On August 31, 2023, the State filed motions to adjourn the jury trial and to dismiss Rush’s case without prejudice. As grounds for the adjournment, the State explained that the Price County District Attorney had resigned on April 7, 2023, and that a special prosecutor was appointed on April 10, 2023. According to the motion, the special prosecutor “notified the State of Wisconsin” on August 1, 2023, that August 31, 2023, “would be his last day.” The State further stated that the governor was expected to announce the appointment of a new district attorney “soon” but that “it is not anticipated that the” new district attorney would start by September 13, 2023. Further, the State explained that the assistant district attorney would be working in Taylor County on that date. Therefore, the State argued that given “the unique deployment of the prosecutors in this office, it is not possible for this office to prosecute this case on September 13, 2023.”

¶7 In response, Rush agreed “that the matter must be dismissed,” although he argued that this result was required because the State’s deadline to

³ On appeal, Rush uses May 31, 2023, as the date the State received his prompt disposition request. The State, in turn, alleges that it received the request one day earlier, on May 30, 2023. Given the State’s concession, we assume for purposes of this appeal that the State received the request on the earlier date. Based on the May 30, 2023 date, the State had until August 28, 2023, to either bring Rush to trial or dismiss the case. See WIS. STAT. § 971.11(3).

⁴ On appeal, both parties cite the circuit court’s notices of hearing setting these dates. While these documents do not appear in the record before this court, we reference them in our analysis given the parties’ agreement as to their existence and contents. We also note that the scheduling occurred off the record.

bring him to trial under WIS. STAT. § 971.11(3)—August 28, 2023—had already passed. Citing ***State v. Davis***, 2001 WI 136, 248 Wis. 2d 986, 637 N.W.2d 62, Rush argued that the State must meet “two requirements” to obtain dismissal without prejudice for a violation of a defendant’s prompt disposition request under the IDA. First, argued Rush, the State must demonstrate “good cause” for why the IDA deadline was violated. Second, the State must show that dismissal must result in “some form of detriment on the State or benefit on the Defendant.” Rush further argued that in conducting this analysis, a court should consider the factors listed in ***Davis***.

¶8 Turning to the facts of his case, Rush asserted that the circuit court should dismiss his charges with prejudice because “[t]he violation of the statutory timeframe in this matter appears to be plain negligence,” and he noted that the trial was scheduled “from day one at a date that exceeded the timeframe given” under the statute. Rush stated that while he was “certainly aware of staffing issues ... with the Price County District Attorney’s Office, the statutory time period in this matter had already been violated before the State’s motion was filed or the circumstances cited in the motion were known.” Defense counsel stated that he speculated the trial “was unintentionally set within a timeframe of [a] felony case” under the IDA, see WIS. STAT. § 971.11(2), and, therefore, the State had failed to demonstrate “good cause ... for why it ended up being set for the date it was or why the timeframe was violated.”

¶9 Rush further argued that dismissal without prejudice would not be detrimental to the State because “the case would just be refiled at some indeterminate point in the future” and the “procedural roadblocks” (e.g., a preliminary hearing) identified in ***Davis*** would not apply in this misdemeanor case. Conversely, Rush claimed that dismissal without prejudice would not be

beneficial to him; rather, he asserted that it would have a detrimental effect because “[w]hatever programing or effort toward rehabilitation or improving his security level within the prison system could immediately be halted pretty much at any point.” Rush argued that this fact would also increase his “anxiety and concern.”

¶10 The State attested that it could not explain why the September 2023 trial date was set, but it argued that that “[t]he defense clearly was aware” that the date was set beyond the IDA deadline and nonetheless “chose to sit on its hands.” The State further stated that given that Rush had another pending criminal case in Iron County, Rush would be prevented “from the counseling or other programming that” would otherwise be available. In addition, the State noted that “this is a victims case and ... the Court needs to concern itself with victim’s rights.”

¶11 In an oral ruling on September 5, 2023,⁵ the circuit court granted the State’s motion to dismiss the matter without prejudice. The court stated that it was unsure “what discussions occurred back in May” in terms of scheduling the trial but that “the way that ... scheduling occurs tells me that there was a consensus that yes, it’s okay to set this” for trial on September 13, 2023. In addition, the court noted that the trial date would have been selected with defense counsel’s “calendar being taken into consideration.” The court also stated that “if there had been a comment at that time, well, wait, we can’t do it that late because there’s a 90-day limit, then the matter would have been set much earlier and disposed of.”

⁵ Rush was not present at the hearing because he was attending his plea and sentencing hearing in the Iron County case on the same date.

The court found that Rush’s request for dismissal with prejudice under the IDA was, therefore, “at the very least odd” and “at the very greatest a bit manipulative.”

¶12 The circuit court then moved to “the other part of the analysis” and considered the detriment to Rush. The court found that Rush’s attempt to “receive appropriate programming” while incarcerated would not be affected by the court’s decision to dismiss the matter without prejudice because Rush had the separate open case in Iron County that was proceeding to sentencing.

¶13 Rush now appeals.

DISCUSSION

¶14 The IDA “applies when a criminal case is brought against an inmate of a state prison and directs the warden, at the inmate’s request, to send a written request to the district attorney for prompt disposition of the case.” *State v. Butler*, 2014 WI App 4, ¶4, 352 Wis. 2d 484, 844 N.W.2d 392 (2013); WIS. STAT. § 971.11(1). “If the crime charged is a misdemeanor, the district attorney shall either move to dismiss the charge or bring it on for trial within 90 days after receipt of the request.” Sec. 971.11(3). With exceptions not relevant here, “the case shall be dismissed” if not brought to trial within the specified time period. Sec. 971.11(7).

¶15 When a criminal case is not brought for trial within the time period set forth in WIS. STAT. § 971.11, a circuit court has the discretion to dismiss the matter with or without prejudice. See *Davis*, 248 Wis. 2d 986, ¶¶5, 14. A circuit court erroneously exercises its discretion when it fails to examine the relevant facts, applies the wrong legal standard, or does not use a demonstrated rational

process to reach a reasonable conclusion. ***Brown County v. Shannon R.***, 2005 WI 160, ¶37, 286 Wis. 2d 278, 706 N.W.2d 269. “Regardless of the extent of the trial court’s reasoning, [a reviewing court] will uphold a discretionary decision if there are facts in the record which would support the trial court’s decision had it fully exercised its discretion.” ***State v. Hurley***, 2015 WI 35, ¶29, 361 Wis. 2d 529, 861 N.W.2d 174 (alteration in original; citation omitted).

¶16 Our state supreme court in ***Davis*** set forth the following nonexclusive factors a circuit court should consider in exercising its discretion to dismiss a criminal case with or without prejudice due to the State’s failure to bring the case to trial within the time period set forth in WIS. STAT. § 971.11:

the reasons for and the length of the delay in bringing the criminal case on for trial; whether the nature of the case makes it unreasonable to expect adequate preparation within the statutory time period; an accused’s conduct contributing to the delay; an accused’s waiver of the statutory right to prompt disposition; the harm to an accused resulting from the delay, such as anxiety and concern; the effect of the delay on an accused’s legal defenses; the effect of the delay on the programs and movement within the institutions available to an accused; the effect of the delay on the orderly rehabilitation process of an accused within the Department of Corrections; the effect of the delay on an accused’s concurrent sentencing possibilities; the effect of the delay on an accused’s possible transfer to a less secure facility; the effect of the delay on an accused’s opportunity for parole; the effect of the delay on the transfer of the accused to another institution; the effect of the delay and dismissal on the public interest in the prompt prosecution of crime; and the effect of the delay and dismissal on the victim.

Davis, 248 Wis. 2d 986, ¶29 (footnote omitted).

¶17 Rush argues that the circuit court erroneously exercised its discretion by dismissing the case without prejudice because the State “failed to show good cause for its violation” of the IDA. Rush notes that there is no evidence in the

record explaining why the original trial date was scheduled beyond the August 28, 2023 deadline, and, therefore, the circuit court “was ... wrong to place blame on” the defense for scheduling the trial beyond the deadline. In addition, Rush argues that the court “misunderstood” his argument regarding prison programming.

¶18 We agree with Rush that the record does not support the circuit court’s finding that Rush essentially consented to having the trial scheduled beyond the August 28, 2023 deadline. As Rush argues, it was “erroneous to shift blame to [defense counsel], where the record is silent on whether or when he became aware of the [IDA] request.” The scheduling of the trial date occurred off the record, and the State expressly concedes, contrary to the court’s finding, that it “is not clear” from the record whether the trial was originally scheduled beyond the IDA deadline due to “mistake, consensus, or for another reason.” The State also expressly concedes that “Rush’s conduct did not contribute to the delay.”

¶19 While *Davis* permits a circuit court to consider an accused’s conduct contributing to a delay when deciding whether to dismiss a case with or without prejudice under the IDA, the record does not support a finding that Rush was involved in the trial scheduling or that defense counsel was aware of the IDA request when scheduling the trial. See *State v. Lewis*, 2004 WI App 211, ¶14, 277 Wis. 2d 446, 690 N.W.2d 668 (concluding that there was no waiver under the IDA where at a pretrial conference, where the defendant was not present, defense counsel had “acquiesced to the rescheduled trial date only after the prosecutor indicated, incorrectly, that no request for prompt disposition had been filed”). Accordingly, the circuit court erroneously based its analysis on Rush’s, or his defense counsel’s, acquiescence when setting the trial beyond the deadline.

¶20 This conclusion does not end our analysis. The circuit court also dismissed the case without prejudice based on the lack of detriment to Rush, specifically as it related to his desire to receive appropriate programming while incarcerated.⁶ The court stated that Rush’s attempt to “receive appropriate programming” while incarcerated would not be affected by its decision to dismiss the matter without prejudice because Rush had the separate open case in Iron County that was proceeding to sentencing.

¶21 Rush contends that the circuit court misunderstood his argument regarding prison programming. According to Rush, “[h]is point was not that the dismissal itself would affect his programming. It was that the State’s ability to refile the case whenever it wanted ... would place his participation in jeopardy, and he could not be sure whether or when that would occur.” In turn, the State points out that Rush acknowledges that the State refiled the charges in this case following the court’s decision to dismiss without prejudice and that he is currently out of custody on a signature bond on those charges.

⁶ We pause to note that Rush incorrectly asserts that in order to dismiss a case without prejudice for a violation of the IDA, the State must show that there was good cause for the delay and that there would be some benefit—or, at the very least, no detriment—to a defendant as a result of dismissing without prejudice. The *Davis* court did not state that dismissal with prejudice is required, as a matter of law, when the State fails to show “good cause” for the delay or when there is a detriment to the defendant as a result of dismissing his or her charges without prejudice. While *Davis* permits a court to dismiss a defendant’s charges with prejudice on these grounds, these grounds are not prerequisites to dismissal without prejudice. Indeed, these considerations fit into the nonexclusive factors outlined by the *Davis* court for a circuit court to weigh when dismissing a case. See *State v. Davis*, 2001 WI 136, ¶29, 248 Wis. 2d 986, 637 N.W.2d 62.

We further note that we do not consider the district attorney’s office’s staffing issues in our analysis because these issues were given as a reason for why the State was seeking to adjourn the September 13, 2023 trial date. However, as explained, this date was already beyond the August 28, 2023 IDA deadline.

¶22 Rush responds that his signature bond “does not change the fact that the delay placed his programming and movement in jeopardy.” Be that as it may, Rush has failed to explain how dismissal without prejudice was detrimental to his incarcerated or rehabilitative status where he was ultimately released from custody on a signature bond.⁷

¶23 Moreover, the record supports the circuit court’s exercise of discretion for two additional reasons. See **Hurley**, 361 Wis. 2d 529, ¶29. First, the State correctly notes that Rush has never alleged that his ability to defend against the three counts of receiving stolen property would in any way be prejudiced by a dismissal without prejudice. See **Davis**, 248 Wis. 2d 986, ¶29. Second, this case involves three victims of stolen property, and, as the State argues, those victims’ right to restitution would be negatively affected by dismissal with prejudice. See **id.** Even if the victims in this case were not entitled to restitution, as Rush contends, dismissal with prejudice would still implicate their rights “[t]o a speedy disposition of the case ... in order to minimize the length of time they must endure the stress of their responsibilities in connection with the matter.” See WIS. STAT. § 950.04(1v)(k); see also WIS. CONST. art. I, § 9m(2)(d).

¶24 In short, while the record does not support the circuit court’s consideration of Rush’s and defense counsel’s purported acquiescence to the original trial date, the court’s discretionary decision to dismiss the case without

⁷ Rush also argues that he has “now been released from prison on the sentence he was serving when this case was filed, meaning that the State has made it impossible for him to receive concurrent sentences in the event of conviction.” We disagree that the State’s failure to comply with the IDA caused Rush to not have the option of receiving concurrent sentences, particularly where the record is silent as to when Rush was sentenced in that case.

prejudice is supported by the record given the lack of detrimental effect on Rush's incarceration and his defense, as well as the ultimate impact dismissal with prejudice would have on the three victims in this case.

By the Court.—Order affirmed.

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

