

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

May 22, 1997

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

**NOTICE**

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

**No. 95-1549-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ANTHONY G. MERRIWEATHER,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Dodge County:  
DANIEL W. KLOSSNER, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Roggensack, JJ.

PER CURIAM. Appellant inmate Anthony G. Merriweather appeals from a circuit court order dismissing without prejudice two criminal charges against him of battery against an officer. Merriweather argues that the circuit court erred because the charges should have been dismissed with prejudice for the State's delay in bringing the charges, as well as for failure to honor his

speedy trial request. Merriweather also argues that the court erred by not granting his request for stamps and other legal supplies, and that a dismissal with prejudice should be granted in the interests of justice. For the reasons set forth below, we affirm the circuit court's decision.

## **BACKGROUND**

In 1992, Merriweather was involved in a prison melee in the Waupun Correctional Institution cafeteria. In 1994, he was charged with two counts of battery to an officer. According to evidence adduced at his bindover, he kicked one officer in the ribs, and hit another in the face. After being charged, he filed a speedy trial request. However, at his own counsel's request, the trial was set over to permit counsel to settle his father's estate in Mexico. The court granted the continuance over Merriweather's personal objection, finding that good cause had been shown. The new trial date set was outside the 120-day speedy trial deadline set by §§ 971.10 and 971.11, STATS.

Merriweather moved to dismiss on two grounds: first, that he had been prejudiced by the initial delay in charging, and second, on speedy trial grounds. In denying the motion to dismiss for charging delay, the court concluded that Merriweather had not been prejudiced because a videotape existed which would refresh his memory of who the witnesses were, because there had been no showing that the witnesses Merriweather desired to call were actually unavailable, and because Merriweather did not show that delay had been created by the State for improper purposes. Regarding the speedy trial motion, the court granted Merriweather's motion to dismiss the case, but did so without prejudice. The court specifically found that there had been good cause for going beyond the 120-day period; that Merriweather was not prejudiced by the speedy trial delay; and

that Merriweather did not show extraordinary circumstances justifying dismissal with prejudice. The court anticipated that the charges would be refiled, which was in fact done.

Before the circuit court, Merriweather also argued that he should be granted stamps, paper, pens, photocopying and other legal supplies. The court granted his motion, ordering the Department of Corrections to comply with its own administrative rules for access to legal supplies.

## DISCUSSION

### **Charging Delay.**

Merriweather argues that the circuit court erred in finding permissible the two-year delay in charging. In order to prevail on this argument, Merriweather would have to show both that the delay actually prejudiced him, and that the delay resulted from some improper motive by the State. *State v. Wilson*, 149 Wis.2d 878, 904-05, 440 N.W.2d 534, 544 (Ct. App. 1988), citing *State v. Rivest*, 106 Wis.2d 406, 418, 316 N.W.2d 395, 401 (1982). Therefore, we must decide whether Merriweather proved facts which would fulfill the legal standard for prejudice. This presents a mixed question of law and fact, wherein we examine two matters: (1) what occurred; and (2) whether the facts found fulfill a particular legal standard. *State v. Gollon*, 115 Wis.2d 592, 600, 340 N.W.2d 912, 916 (Ct. App. 1983). On review, the circuit court's factual findings, "the underlying findings of what happened," will not be overturned unless clearly erroneous. *State v. Johnson*, 153 Wis.2d 121, 127, 449 N.W.2d 845, 848 (1990); § 805.17(2), STATS. However, whether the facts found satisfy a particular legal standard is a question of law which we review independently. *Johnson*, 153 Wis.2d at 127-28, 449 N.W.2d at 848.

As to actual prejudice, the district attorney informed the court that a videotape existed of the melee which would be made available to Merriweather to refresh his memory of the witnesses present. As to the motive for the charging delay, the district attorney informed the court that delay resulted from a combination of circumstances. First, her predecessor district attorney had delayed in bringing charges because he could not decide how to charge the case; second, during her regime, further delay occurred in reviewing the many boxes of materials to determine what charge to file, and in finding a special prosecutor willing to undertake the prosecution, which was necessitated because of personnel limitations in the district attorney's office.

The court found that Merriweather's assertion of prejudice arising from the charging delay rested on the unsupported assertion that Merriweather would not be able to find the witnesses to the melee. His assertion was unsupported because of the video tape and because Merriweather had not tried to find the witnesses through the Department of Corrections records, or through social security numbers or any other method. Based on that finding, and the representations of the district attorney, the court concluded that Merriweather had not shown prejudice, nor had he shown an improper motive.

We defer to the circuit court's factual finding that Merriweather failed to support his assertion that the witnesses were actually unavailable. Further, we independently conclude that the legal standard for prejudice was not met. Merriweather had access to a videotape which showed the melee, and necessarily, the witnesses to it. As to improper motive, no evidence was presented. *Wilson*, 149 Wis.2d at 904-05, 440 N.W.2d at 544.

**Speedy Trial.**

Merriweather also argues that he was denied a speedy trial.<sup>1</sup> The circuit court agreed and dismissed the case. Therefore, Merriweather is not aggrieved by the court's ruling and we do not consider it further. See *Koller v. Liberty Mut. Ins. Co.*, 190 Wis.2d 263, 266, 526 N.W.2d 799, 800 (Ct. App. 1994).

**Dismissal Without Prejudice.**

The circuit court dismissed the case without prejudice, contemplating that the charges would be refiled. This was done. Merriweather argues that the court erred because the case should have been dismissed with prejudice.

A case will be dismissed with prejudice for failure to meet the speedy trial deadlines when "extraordinary circumstances" exist. See *State v. Lemay*, 155 Wis.2d 202, 214, 455 N.W.2d 233, 238 (1990). The four factors to be examined to determine extraordinary circumstances are the defendant's assertion of speedy trial right, the reason for delay, the amount of delay in proceeding to trial and the level of prejudice to defendant. *Id.* at 212, 455 N.W.2d at 237, citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

Defendant filed a speedy trial request in mid-December 1994. However, defendant did not provide evidence supportive of any of the remaining factors of the test set out in *Lemay*. The set-over was requested by defense

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<sup>1</sup> The right to a speedy trial is guaranteed by both the United States and Wisconsin constitutions. U.S. CONST. amend. VI; Wis. CONST. art. I, § 7.

counsel, who told the court that his father's sudden death necessitated his immediate presence in Mexico to wind up his father's affairs. Over Merriweather's personal objection, the circuit court specifically found that good cause was shown. Counsel also said that even had his father not died, set-over would have been appropriate because the State had only recently responded to his discovery requests.

Furthermore, the delay added only three-and-one-half months to the trial schedule, moving the trial from February 8, 1994 to May 31, 1994. Thus, Merriweather was set for trial eight and one-half months<sup>2</sup> from the date of his initial appearance on September 12, 1994, rather than the five months initially contemplated.

In regard to prejudice to defendant from the delay, the issue is whether a three-and-one-half month trial delay created such substantial prejudice to Merriweather that the circuit court erred in dismissing without prejudice. *Lemay*, 155 Wis.2d at 214, 455 N.W.2d at 238. To resolve this issue, we must analyze the three types of speedy trial delay prejudice identified in *Lemay*: (1) pretrial incarceration, (2) anxiety and concern during the elapsed time, and (3) impairment of the defense. *Id.* at 213-14, 455 N.W.2d at 237-38.

Given that Merriweather is serving a seventy-five year sentence on an unrelated conviction, pretrial incarceration is not an issue. Similarly, anxiety and concern over pending criminal charges are necessarily more limited for a long-term inmate than for others. As to impairment of the defense, we reject this

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<sup>2</sup> Ironically, because the circuit court ultimately granted Merriweather's motion for dismissal on speedy trial grounds, the actual delay for trial was far longer.

argument for at least two reasons. First, Merriweather's own response at the time reveals that he did not view a set-over as prejudicial. Rather, Merriweather viewed the delay as an opportunity for further research, moving the circuit court for access to further legal supplies such as pens, paper, photocopying and stamps. Second, as stated above, defense counsel told the court that regardless of his father's death, set-over would have been appropriate because he had only recently received the State's discovery materials. Additional time to research newly-delivered materials is more likely to avoid prejudice than create it.

### **Legal Supplies.**

Merriweather argues that the court erred in failing to grant him access to legal supplies. This contention is contradicted by the record. The court granted Merriweather the pens, paper, stamps, etc. he was entitled to under Department of Corrections guidelines. Therefore, we need not consider this matter further. *See Koller*, 190 Wis.2d at 266, 526 N.W.2d at 800.

### **Interests of Justice.**

Finally, Merriweather argues that the interests of justice require dismissal with prejudice. However, because we have found each of Merriweather's arguments to be without substance, adding them together and renaming them "interests of justice" adds nothing. *Mentek v. State*, 71 Wis.2d 799, 809, 238 N.W.2d 752, 758 (1976). We conclude the interests of justice will not be furthered by a retrial.

*By the Court.*—Order affirmed.

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





