STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case Nos. 92-0828-CR,
92-0829-CR, 92-0830-CR,
& 92-0831-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LAWRENCE HARRIS,

Defendant-Appellant.

Appeal From The Judgments And Orders Entered In The Circuit Court For Milwaukee County, The Honorable Janine P. Geske, Circuit Judge, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I.

THE TRIAL COURT WAS DEPRIVED OF JURISDICTION TO PROCEED IN THE ESCAPE PROSECUTION WHEN MR. HARRIS WAS UNREASONABLY DETAINED FOR SIX DAYS FOLLOWING HIS ARREST BEFORE BEING TAKEN TO COURT AND CHARGED WITH A CRIME.

A. Mr. Harris Did Not Waive His Jurisdictional Argument.

The state's waiver argument is meritless. State's Brief at 10-15. The state concedes that jurisdictional defects are not waived by a guilty plea. Id. at 10. That is exactly the type of defect raised here.

As demonstrated in Mr. Harris' opening brief, Wis. Stat. §970.01 is a mandatory statutory time provision, the violation of which divests the court of the power to adjudicate a particular offense. Harris' Brief at 11-21. Such mandatory time provisions affect the subject matter jurisdiction of the court. See, e.g., State v. Rosen, 72 Wis. 2d 200, 240 N.W.2d 168, 172 (1976) (citations omitted). Criminal subject matter jurisdiction is conferred by law and similarly may be withdrawn by law, as in this case, upon the failure of the court or the state to act within a particular time. See Harris' Brief at 18-19 and cases cited therein. Moreover, although the state asserts that Mr. Harris waived his jurisdictional challenge by pleading guilty, "[s]ubject matter jurisdiction cannot be conferred upon a court by waiver." Rosen, 240 N.W.2d at 172 (citation omitted).[1]

B. Mr. Harris' May 11, 1990 Arrest On The Escape-Related Charges Triggered The Mandatory Requirements Of Wis. Stat. §970.01.

The state asserts in conclusory form, as it did in the trial court (R32:4; R-Ap. 102), that Mr. Harris was not "formally arrested" at the time the deputies thwarted

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[1] The state also erroneously describes Mr. Harris' guilty plea colloquy as "personally acknowledg[ing] he was waiving earlier-raised grounds for dismissal." State's Brief at 15; see id. at 8. Rather, the transcript reflects waiver only of his right to raise additional pretrial motions "such as a motion to dismiss, motion to suppress evidence, identification, or statements" (R34:8).

his escape attempt, seized him, returned him to full custody, gave him Miranda warnings, and then confined him to the segregation unit at the jail. State's Brief at 15-19. Once again, the state is wrong.[2]

The state erroneously asserts that all relevant underlying facts were stipulated by the parties at the June 3, 1991 court appearance so that the issue whether Mr. Harris was "arrested" on May 11, 1991 was a question purely of law. State's Brief at 16. As is clear from the transcript preceding that stipulation, the parties hotly disputed the issue of arrest status on the escape related charges (R32:4; R-Ap. 102). Rather than resolving the factual issue of whether an "arrest" took place, however, the trial court simply denied Mr. Harris' motion on other, erroneous grounds concerning which Mr. Harris' arrest status on the escape-related charges was irrelevant. Compare State v. McKinney, 168 Wis. 2d 349, 483 N.W.2d 595, 597 (Ct. App. 1992) (noting trial court had made factual finding that defendant was not actually arrested on criminal charge until he was served with a felony arrest warrant on the day before his initial appearance).

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[2] The state apparently is correct, however, that counsel for Mr. Harris erred in assuming that Record Document 76, listed as "Milwaukee County Sheriff's Department offense report" in the Record on Appeal under Case No. F-911763 was the offense report dated May 16, 1992 which actually related to the escape attempt in that case. See State's Brief at 8 n.3. Because the May 16, 1992 report apparently is not in fact in the appellate record, Mr. Harris therefore withdraws his reliance upon that report. See Harris' Brief at 3, 12 & 16.

To the extent that there are any material disputed issues of fact, Mr. Harris' arrest status with regard to the escape-related charges is a factual dispute which may not be resolved by this Court.

> The Court of Appeals is by the Constitution limited to appellate jurisdiction. This precludes it from making any factual determinations where the evidence is in dispute.

Wurtz v. Fleischman, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155, 159 n.3 (1980) (citation omitted).

Where the factual record is inadequate through no fault of the appellant, remand is appropriate to complete that factual record. See, e.g., Zuehl v. State, 69 Wis. 2d 355, 230 N.W.2d 673 (1975) (denial of post-conviction motion without hearing was abuse of discretion); State v. Sarlund, 139 Wis. 2d 386, 407 N.W.2d 544, 546 (1987) (remanding for hearing on voluntariness of no contest plea), appeal dismissed, 484 U.S. 999 (1988); cf., State v. Sorenson, 152 Wis. 2d 471, 449 N.W.2d 280, 291 (Ct. App. 1989) (remanding for evidentiary hearing despite state's prior failure to use opportunity to make required record in trial court); State v. Braun, 103 Wis. 2d 617, 309 N.W.2d 875, 881 (Ct. App. 1981) (same).

Indeed, such a remand is constitutionally required because "[a]ny failure of the appellate process which prevents a putative appellant from demonstrating possible error constitutes a constitutional deprivation of the right to appeal." State v. Perry, 136 Wis. 2d 92, 401

N.W.2d 748, 751 (1987). See also Societe Internationale v. Rogers, 357 U.S. 197, 210 (1958) (due process limits power of courts to rule against a party without affording him a hearing on the merits of his cause).

Mr. Harris respectfully submits, however, that the state has failed to raise any reasonable basis for concluding that Mr. Harris was not in fact under arrest on the escape-related charges. While baldly stating that Mr. Harris was not "formally arrested" the state fails here, as it did in the trial court, to point to any facts supporting those conclusions.

As the state acknowledges, State's Brief at 16-17, the Supreme Court has adopted "an objective test which assesses the totality of the circumstances to determine the moment of arrest for Fourth Amendment purposes." State v. Swanson, 164 Wis. 2d 437, 475 N.W.2d 148, 152 (1991). Under that test, "[t]he standard generally used to determine the moment of arrest in a constitutional sense is whether a reasonable person in the defendant's position would have considered himself or herself to be 'in custody,' given the degree of restraint under the circumstances." Id. (citations omitted).

The state's entire argument appears to rest on the erroneous assumption that Mr. Harris' "custodial status remained exactly the same before, during and after the May 11 escape attempt." State's Brief at 17. This assumption is erroneous in at least three regards. First,

custodial status under Swanson turns not upon the defendant's status as a convicted felon, but upon the particular degree of restraint or, in this case, the change in degrees of restraint. Second, Mr. Harris' custodial status was changed significantly after the attempt when he was confined to the segregation unit of the jail (R76:19-26). A reasonable person in Mr. Harris' position necessarily would have considered himself to be in a different and more oppressive custody after he was so "subdued" given the significant additional degree of restraint under the circumstances. See Swanson, 475 N.W.2d at 152. See also State v. Sugden, 143 Wis. 2d 728, 422 N.W.2d 624, 627 (1988) (noting existence of different kinds of custody within a single prison).

Third, although Mr. Harris did not succeed in actually getting out of the jail, he did achieve, albeit temporarily, a significantly greater degree of freedom than he possessed prior to the escape attempt, having obtained free access to the deputy corridor from which he previously was restricted (R73). When he was later subdued and returned to custody by the deputies, he lost this relative degree of freedom and under the Swanson analysis, was arrested. Had Mr. Harris instead succeeded in making his way to McArthur Square before being returned to custody, the difference would be one only of degree and not of kind. Yet, no one seriously would argue that the latter seizure was not an arrest.

The Supreme Court made this point in an analogous situation in State v. Sugden, 143 Wis. 2d 728, 422 N.W.2d 624 (1988). There, the defendant was confined in a particular locked cottage at Kettle Moraine Correctional Institution. After feigning illness, Sugden took a guard hostage, forced her to unlock the cottage, stole her car, and smashed it through the inner gate of the institution. Sugden nonetheless was subdued inside the institution's outer perimeter.

Although this Court reversed the resulting escape conviction, the Supreme Court reinstated it. That Court held that "one who escapes from a form of custody imposed violates the escape statute even though the escapee does not leave the geographical premises of the institution." 422 N.W.2d at 627. "There may be custody without the walls and custody of various kinds, without limitation, within the walls." Id.

During his escape attempt, Mr. Harris was relatively, though not totally free of restraint. When he was subdued on May 11, 1991, he was subjected to restraints from which he had previously been free; and when he was placed in segregation he was subjected to even more restraints upon his freedom. Under the totality of the circumstances, the difference between his relative freedom during the escape attempt and the imposition of restraints after he was "subdued" constitutes custody under any objective standard. Cf., Sugden, supra. As such, any rea-

sonable person in Mr. Harris' position would understand that he was under arrest. If it is escape to leave such custody, then it is certainly an "arrest" under Swanson to be subjected to it. The trial court docket sheet, reflecting the date of arrest as May 11, 1991 (R72:1), thus merely reflects the obvious.

In essence, the state asserts that a defendant's arrest status must turn on the subjective intent of the arresting officer or the prosecutor rather than imposition of objectively definable restraints. According to the state, a defendant is not arrested until the prosecutor decides to file charges. State's Brief at 16. As the state acknowledges, however, the Supreme Court specifically rejected that argument in Swanson, 475 N.W.2d at 152.

C. The State Fails To Meet Its Burden Of Demonstrating The Reasonableness Of The Delay.

The state argues that, despite the presumptive 48-hour constitutional limit on reasonableness set forth in County of Riverside v. McLaughlin, 111 S.Ct. 1661, 1670 (1991), the six-day delay here could be deemed reasonable because "[a] decision on whether to file additional criminal charges, which particular charges might be appropriate and who other than defendant himself would be charged could reasonably be expected to take several days time." State's Brief at 20.

The same rationalizations, however, would apply

in nearly every case. In every run-of-the-mill theft, burglary or assault case, the prosecutor no doubt would prefer having several days after the defendant's arrest to mull over such possibilities. That preference, however, does not demonstrate "the existence of a bona fide emergency or other extraordinary circumstance" as would justify the delay. McLaughlin, 111 S.Ct. at 1670.[3] See also State ex rel. Van Ermen v. Burke, 30 Wis. 2d 324, 140 N.W.2d 737, 744 (1966) (condemning 55-hour delay as unreasonable).

D. The Appropriate Remedy Is Dismissal For Lack Of Jurisdiction.

The state's entire "argument" concerning the proper remedy for a violation of §970.01 consists of (1) misconstruing the Van Ermen decision, which left open the question of the proper remedy, as rejecting dismissal as inappropriate, and (2) baldly asserting that the numerous Wisconsin cases recognizing that effect must be given to mandatory statutory time limits, see Harris' Brief at 18-19, are not "even remotely analogous" to the question whether effect should be given to the mandatory statutory

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[3] There is no question of retroactive application of McLaughlin here. See State's Brief at 20 & n.5. Although Mr. Harris was arrested prior to the decision in that case on May 13, 1991, his initial appearance was not until four days after that decision. Even if McLaughlin's 48-hour reasonableness requirement only kicked in on May 13, 1991, therefore, the resulting four-day delay still was unreasonable and violated Wis. Stat. §§970.01(1) & (2).

time limit violated in this case. State's Brief at 21-22. The only assertion which merits any reply is the state's misinterpretation of Van Ermen.

The state asserts that Van Ermen rejected dismissal as an appropriate remedy for unreasonable delay between arrest and initial appearance. State's Brief at 13, 21. The state is wrong. Rather, Van Ermen specifically left open the possible application of such a remedy, noting that dismissal may be appropriate as a prophylactic measure to deter the police from pursuing unreasonable lengths of detention.[4] 140 N.W.2d at 744. The Van Ermen court did not resolve the issue, however, because the defendant there failed to raise it in the trial court. Id. Mr. Harris, on the other hand, properly preserved this issue in the court below. As such, it is squarely presented for decision by this Court.

II.

THE TRIAL COURT'S SENTENCING ERRORS MANDATE RESENTENCING.

The state's response to Mr. Harris' sentencing arguments for the most part merit no further comment. He therefore relies upon his opening brief on these issues.

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[4] The Van Ermen court likewise did not limit the possibility of dismissal to cases involving a prior pattern of police abuse. State's Brief at 13. The Court there noted the possible need "to prevent" such a pattern in the future rather than to punish for past conduct. 140 N.W.2d at 744.

The only exception is the state's assertion, for the first time on this appeal, that the defendant somehow waived his right to be sentenced only on the basis of accurate information. State's Brief at 27-28.

The state waived this waiver argument by failing to raise it in the trial court. E.g., State v. Brown, 96 Wis. 2d 258, 291 N.W.2d 538, 541 (1980) (citations omitted) (state waived waiver argument by raising it for first time on appeal) The state does not even attempt to justify this waiver, nor could it. Although a respondent may be permitted to raise issues for the first time on appeal, see State v. Holt, 128 Wis. 2d 110, 382 N.W.2d 679, 686-87 (Ct. App. 1985), this Court has noted that the Holt rationale applies only when a pure question of law is presented. State v. Milashoski, 159 Wis. 2d 99, 464 N.W.2d 21, 25 (Ct. App. 1990), aff'd on other grounds, 163 Wis. 2d 72, 471 N.W.2d 42 (1991). "[T]he Holt approach ought not to apply where further fact-finding on the underlying question is necessary to resolution of the issue." Id.[5]

In his post-conviction motions, Mr. Harris specifically argued that, if he was deemed to have waived any issue raised in that motion, then he was denied effective

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[5] This Court in Milashoski noted that application of the waiver rule is discretionary. 464 N.W.2d at 25. Apparently exercising that discretion and finding a sufficient factual record in that case, the Supreme Court addressed the standing issue deemed waived by this Court. See 471 N.W.2d at 46-49.

assistance of counsel at sentencing (R21:7; R43:6; R63:6; R81:6). It is obviously the obligation of counsel to correct any factual inaccuracies in the presentence report. See, e.g., Cook, Defense of Criminal Cases in Wisconsin -- Sentencing, Post-Conviction, Corrections 1-32 to 1-33, 1-35 (1987). Prejudice is demonstrated by the fact of the inaccuracies and reliance upon those inaccuracies by the court.

When neither the state nor the trial court raised waiver at or before the post-conviction motion hearing, there was no apparent reason to resolve the ineffective assistance claim. As waiver was not at issue, the motion was not ripe for decision. A Machner hearing on the motion thus would have been a waste of judicial resources and time.

Because such a hearing is required, however, to properly raise and preserve an effective assistance claim, see State v. Mosley, 102 Wis. 2d 636, 307 N.W.2d 200, 212 (1981), the state's delay in raising the issue of waiver here deprived the defendant of an adequate opportunity to preserve that motion. As such, "[t]o relax the waiver rule in favor of the state makes no sense and does not serve either the efficient administration of judicial business or the interests of justice." Milashoski, 464 N.W.2d at 25. See also Herman v. Brewer, 193 N.W.2d 540, 543 (Iowa 1972) (errors properly considered on appeal from denial of post-conviction motion; although issues were

decided against defendant on prior habeas corpus action, trial court considered issues properly before it for determination with apparent consent of state).

If the Court does rely upon Mr. Harris' purported waiver at sentencing, then he is entitled to remand for a hearing on the ineffective assistance claim. As previously noted, remand is appropriate and required by due process to complete the factual record where, as here, that record is inadequate through no fault of the appellant. E.g., Zuehl, supra; see §I,B, supra, and cases cited.

CONCLUSION

For these reasons, as well as for those set forth in Mr. Harris' opening brief, the defendant respectfully asks that the Court grant him the requested relief.

Dated at Milwaukee, Wisconsin, September 3, 1992.

Respectfully submitted,

LAWRENCE HARRIS,
Defendant-Appellant

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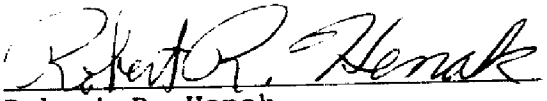

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