COURT OF APPEALS
DECISION
DATED AND RELEASED

AUGUST 13, 1996

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.

Nos. 95-3528-CR
95-3529-CR
95-3530-CR
95-3531-CR
95-3532-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EDWARD C. BRANDAU,

Defendant-Appellant.

APPEALS from judgments and an order of the circuit court for Outagamie County: JOSEPH M. TROY, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Edward Brandau appeals judgments convicting him on his no contest pleas of arson, armed robbery, criminal trespass, and two counts of theft. He also appeals a judgment convicting him of armed robbery

following a jury trial. In addition, he appeals an order denying his postconviction motions in which he alleged ineffective assistance of his trial and plea attorneys because they incorrectly advised him that he had no speedy trial claims and failed to file motions alleging a violation of his speedy trial rights. The trial court denied the postconviction motion without a hearing and without considering the merits after the court lost its authority to proceed under RULE 809.30(2)(i), STATS. We conclude that Brandau's attorneys were not ineffective and that Brandau was not prejudiced by their failure to raise the speedy trial issue because the record conclusively shows that Brandau's speedy trial rights were not violated. Therefore, we affirm the judgments.

To establish ineffective assistance of counsel, Brandau must establish that his counsels' performance was deficient and that their deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). An attorney's performance is not deficient if he fails or refuses to file a nonmeritorious motion and his client suffers no prejudice from that decision. Because the record conclusively shows that Brandau's speedy trial rights were not violated, no postconviction hearing is necessary before the claim of ineffective assistance of counsel can be properly rejected.

When considering constitutional speedy trial claims, this court must consider the length of the delay, the reason for the delay, the defendant's assertion of his right and any claims of actual prejudice to the defense. *See* ***Barker v. Wingo***, 407 U.S. 514, 530 (1972). The State concedes that the delay of approximately two and one-half years from the filing of the first complaint until disposition is sufficient to implicate Brandau's speedy trial rights. However, none of the other factors support Brandau's claim.

The reason for the delay is substantially attributable to Brandau. Brandau fled Wisconsin shortly after the first complaints were issued. He then committed crimes in Kentucky and Iowa before he was apprehended. Iowa and Kentucky had priority over Wisconsin in bringing Brandau to trial. Wisconsin was not obligated to attempt to prosecute Brandau while he was awaiting trial in another state. *See* ***Foster v. State***, 70 Wis.2d 12, 18, 233 N.W.2d 411, 414 (1975). Upon resolution of the Kentucky charges, Wisconsin promptly

commenced proceedings against Brandau and brought him to trial without delay.

Brandau attempts to hold Wisconsin responsible for some or all of the delay he encountered in Kentucky and Iowa because Wisconsin did not attempt to procure his presence by a governor's warrant or an interstate detainer until after Iowa and Kentucky had completed their trials. A governor's warrant could not have compelled Iowa or Kentucky to produce Brandau for trial in Wisconsin before they completed their prosecution of him. There is no mechanism by which Wisconsin could compel Iowa to give Wisconsin priority over Kentucky's cases. In addition, Brandau did not promptly act to compel Kentucky to begin its prosecution of him. The delays in commencing the Wisconsin prosecution are substantially attributable to Brandau.

Brandau made a demand for a speedy trial on October 5, 1994 (case no. 94-CF-233) and again on October 28, 1994 (case no. 92-CF-231). Both of these cases were tried within ninety days of his demand.

Finally, Brandau has established minimal prejudice from the delay. At various times, Brandau has claimed loss of memory, places of employment that went out of business depriving him of an alibi defense (although he later admitted that he was not employed at the times alibis would be required) and he finally alleged that his father, who died in July of 1993, was his alibi witness. Nothing in the record suggests that his father remembered the days in question or would provide Brandau with an alibi. Even assuming that his father would have provided a credible alibi defense, the loss of that defense is not attributable to the State's conduct. Rather, because his father died before disposition of the Kentucky charges, any prejudice Brandau suffered is the result of his absconding and committing crimes in other jurisdictions.

By the Court.—Judgments and order affirmed.

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