COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1678-CR **Cir. Ct. No. 2012CT7**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN C. BEAHM,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Brian Beahm appeals the circuit court's judgment convicting him of operating a motor vehicle while intoxicated as a second offense.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Beahm asserts that the State violated his right to a speedy trial. Although the State concedes that the approximately twelve- to thirteen-month delay in this case was the State's fault, I affirm because Beahm's arguments do not persuade me that any of the other right-to-speedy-trial factors weigh significantly in his favor.

Background

¶2 Beahm was arrested for the OWI offense in this case on February 6, 2011. He received a citation setting an initial appearance date of April 25, 2011. Although he was booked at the county jail, he posted cash bail on the same day and was released.

¶3 The district attorney's office sent a letter to Beahm dated March 15, 2011, stating that the initial appearance date would be rescheduled and that Beahm did not need to appear on April 25. The letter explained that Beahm would receive a summons with a new court date. It was not until about eleven months later, however, that the State filed the summons and criminal complaint. In addition, it appears that the State sent the summons and complaint to a wrong address so that Beahm did not promptly receive it.

¶4 Although the parties do not indicate in their briefing when Beahm finally received the summons and complaint, the record shows that the State had Beahm personally served with the summons and complaint on March 14, 2012. A new initial appearance date was set for April 2, 2012.

¶5 Beahm moved for dismissal with prejudice, asserting that the State's delay violated his right to a speedy trial. After a hearing at which neither Beahm nor the State offered any evidence, the circuit court denied the motion. Beahm

subsequently entered a no contest plea. I reference additional facts as needed below.

Discussion

¶6 I review de novo the circuit court's conclusion that the State did not violate Beahm's right to a speedy trial. ***State v. Borhegyi***, 222 Wis. 2d 506, 508, 588 N.W.2d 89 (Ct. App. 1998). "When a defendant asserts a violation of his constitutional right to a speedy trial, the court employs a four-part balancing test ...." ***Id.*** at 509. The four factors are: "(1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant." ***Id.*** "The right … is not subject to bright-line determinations and must be considered based upon the totality of circumstances that exist in any specific case." ***Id.*** "If, under the totality of circumstances, the defendant was denied the benefit of his constitutional right to a speedy trial, dismissal of the charges is required." ***Id.*** at 509-10. I now address the four factors under the balancing test.

Factor 1—Length Of Delay

¶7 The United States Supreme Court in ***Doggett v. United States***, 505 U.S. 647 (1992), explained that the first factor, length of delay, serves a threshold purpose:

> The first of these [four factors] is actually a double enquiry. Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from "presumptively prejudicial" delay, since, by definition, [the accused] cannot complain that the government has denied [the accused] a "speedy" trial if it has, in fact, prosecuted his case with customary promptness. If the accused makes this showing, the court must then consider, as one factor among several, the extent to which the delay stretches

> beyond the bare minimum needed to trigger judicial examination of the claim.

Id. at 651-52 (citations omitted).

¶8 The State does not dispute Beahm's assertion that Beahm's right to a speedy trial attached on the date of Beahm's arrest. *See* ***Borhegyi***, 222 Wis. 2d at 510-11 (right to speedy trial attached on date of arrest). I take the point as conceded. Therefore, the pertinent period of delay here appears to be about thirteen months, the time period from the date of Beahm's arrest to the date the State had Beahm personally served. Beahm and the State might disagree as to whether the time period should be as little as twelve months or as much as fourteen months, but these relatively small differences do not matter for purposes of the speedy trial issue here.

¶9 Although not affirmatively conceding the point, the State does not seriously argue that the delay was insufficient to trigger the full four-factor speedy trial inquiry. I will assume, consistent with the State's implicit concession, that the delay was sufficient, and continue with the four-factor inquiry. *See* ***Doggett***, 505 U.S. at 652 n.1 ("Depending on the nature of the charges, the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year.").

¶10 The length of delay in this case is not, by itself, a significant factor in Beahm's favor. A delay of thirteen months does not tell us much without reference to the other three factors. *See, e.g.*, ***Barker v. Wingo***, 407 U.S. 514, 533-36 (1972) (defendant *not* denied right to speedy trial even when there was "extraordinary" delay of more than five years).

Factor 2—Reason For Delay

¶11 As already indicated, the State concedes that the delay was the State's fault. Similarly, the State conceded in the circuit court that the reason for the delayed filing was that someone in the district attorney's office placed Beahm's case in the wrong "pile." I therefore conclude that the reason-for-delay factor weighs in Beahm's favor, although not as much as it would if the State's delay were deliberate. Beahm does not argue that the State's delay was deliberate or in reckless disregard of his rights. *See* ***Borhegyi***, 222 Wis. 2d at 512-14 ("even negligence weighs against the State," but not as heavily as deliberate delay or "[c]avalier disregard" of the defendant's right to a speedy trial).

Factor 3—Assertion Of Right To Speedy Trial

¶12 Beahm does not develop an argument on the assertion-of-the-right factor, other than to express his view that he could not have demanded a speedy trial until the April 2, 2012 appearance date, fourteen months after his arrest. The State asserts that Beahm never filed a "demand" for a speedy trial. The State does not, however, assert that Beahm had the opportunity or obligation to file a demand or to otherwise assert his right prior to when the State served Beahm with the summons and complaint. Given the parties' limited arguments on this topic, I do not view this factor as cutting significantly in either direction.

Factor 4—Prejudice To Defendant

¶13 I turn to the fourth factor, prejudice to the defendant. The prejudice factor requires consideration of three defendant interests: "(1) preventing oppressive pretrial incarceration; (2) minimizing the accused's anxiety and

concern; and (3) limiting the possibility that the defense will be impaired." ***Id.*** at 514.

¶14 Beahm concedes that there was no pretrial incarceration here. He asserts, without further explanation, that he "lived under a cloud of anxiety as anyone would charged with a crime." Absent further argument or factual support, that assertion does not show significant prejudice based on anxiety and concern.

¶15 The important question that remains is whether the thirteen-month delay in this case impaired Beahm's defense. The Supreme Court has characterized the impairment-of-defense interest as "'the most serious'" of the three "'because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.'" ***Doggett***, 505 U.S. at 654 (quoted source omitted).

¶16 Beahm's only impairment-of-defense argument relates to the blood sample that the State obtained from Beahm at the time of his arrest. Beahm argues that the State's delay in this case prevented Beahm from examining the blood sample and, therefore, prevented him from conducting his own test of the blood or offering expert testimony based on such a test.

¶17 The State argues that, at the hearing on Beahm's speedy trial motion, Beahm failed to offer any evidence showing that Beahm lacked the opportunity to have the blood sample tested. The State acknowledges that there was some general discussion at the hearing about how long blood samples are typically retained by the state laboratory that tests them, but, the State asserts, "Beahm never made any factual showing or even assertion that he had even inquired if the blood was still available."

¶18 Beahm has not filed a reply brief, but his principal brief is responsive. As I understand it, Beahm argues that, under ***Doggett***, once the full four-factor review is triggered by a "presumptively prejudicial" delay such as the delay here, the State has the burden to rebut this "presumptive prejudice" with an affirmative showing. In other words, Beahm's argument seems to be that he wins on prejudice because the State failed to offer evidence that the blood sample remained available. I am not persuaded.

¶19 Beahm's sole support for his argument is ***Doggett***. He appears to rely primarily on the following passage from that case:

> [T]he Government claims Doggett has failed to make any affirmative showing that the delay weakened his ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence. Though Doggett did indeed come up short in this respect, the Government's argument takes it only so far: consideration of prejudice is not limited to the specifically demonstrable, and, as it concedes, affirmative proof of particularized prejudice is not essential to every speedy trial claim. [This Court has] explicitly recognized that impairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony "can rarely be shown." And though time can tilt the case against either side, one cannot generally be sure which of them it has prejudiced more severely. Thus, we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify. While such presumptive prejudice cannot alone carry a [speedy trial] claim without regard to the other … criteria, it is part of the mix of relevant facts, and its importance increases with the length of delay.

Id. at 655-56 (citations omitted).

¶20 While the significance of this passage may be arguable, Beahm's minimally developed argument does not persuade me that ***Doggett*** stands for a bright-line, burden-shifting rule like the one he seems to advance. Moreover, the

availability or unavailability of Beahm's blood sample is a fact that would appear to be "specifically demonstrable" and not "difficult ... to prove" and, therefore, not the type of prejudice inquiry that the ***Doggett*** Court would have viewed as beyond proof. *See* ***id.*** at 655. The blood sample was either available or not available, and Beahm suggests no reason why this would have been difficult for him to discover and prove.[2]

¶21 Absent further argument by Beahm on the matter, I see no basis to conclude that Beahm's defense was impaired by the State's delay and therefore no reason to conclude that the delay resulted in any significant prejudice.

¶22 Considering the totality of the circumstances as discussed above, I agree with the circuit court that the State's delay did not violate Beahm's right to a speedy trial. Apart from the State's negligence in causing the delay, there is no factor here that weighs strongly in Beahm's favor. While the State's negligence is a significant factor, it is not enough to show a speedy trial violation here.

Conclusion

¶23 In sum, for the reasons stated above, I affirm the judgment of conviction.

[2] The State points out that the circuit court made a factual finding that Beahm had an opportunity to "arrange for alternate blood sample testing." I do not rely on this finding, however, because it is not clear to me that there is something in the record to support it. As the State recognizes, although there was some general discussion at the hearing about how long blood samples are typically retained by the state laboratory that tests the blood, the parties chose not to offer any evidence on the availability of Beahm's blood sample. And, I see no concession by Beahm that he had an opportunity to arrange for a test of the blood sample. At most, the hearing transcript shows Beahm's concession that he did not make any effort to determine whether the blood sample was available.

By the Court.—Judgment affirmed.

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