

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 16, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-0628-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES HUDSON,

DEFENDANT-APPELLANT,

GLENDA DELL MILLER AND KOTHAR BISHOP,

DEFENDANTS.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Charles Hudson appeals from a judgment of conviction entered after a jury found him guilty of forgery, as a party to the crime.

See §§ 943.38(a), 939.05, STATS. He also appeals from the trial court's order denying his motion for postconviction relief. He argues: (1) that he was denied his constitutional right to a speedy trial; (2) that he was denied his constitutional right to represent himself at trial; and (3) that he was denied his constitutional right to representation by counsel of his choice. We affirm.

BACKGROUND

On September 21, 1995, the State issued a complaint against Hudson, charging him with seventeen counts of forgery. The complaint was filed on December 5, 1995, and an information was filed on December 6, 1995. A scheduling conference was held on January 4, 1996, at which time Hudson's counsel requested that the case be set for a projected guilty plea. Hudson, who had been in custody serving a sentence on another charge since July 1995, was not present at the scheduling conference.

The parties next appeared before the court on March 7, 1996, and Hudson's counsel informed the court that he had spoken to Hudson about the terms of the plea bargain that the State had offered, but that he and Hudson did not "see the offer in the same light." Hudson's counsel requested a continuance to permit Hudson to get a second opinion from another attorney as to whether he should accept the plea bargain. Based upon counsel's representation that Hudson did not want to accept the plea bargain, the trial court indicated that it was going to set a firm trial date. Immediately thereafter, Hudson's counsel said, "I believe Mr. Hudson will want to retain other counsel, but I didn't think you would let me withdraw without other counsel to be here to step in." The trial court then set the case for trial on June 10, 1996, and said that any substitution of counsel had to be done by April 1, 1996, and that any plea bargain had to be agreed upon by May 1,

1996. Later in the hearing, however, Hudson prompted his counsel to make a speedy trial demand, and the trial was reset for April 15, 1996. The trial court then said that, because of the speedy trial demand, it would not grant a motion from Hudson's counsel to withdraw from the case; the trial court also said that it would not accept a plea bargain if it was not presented to the court within the next few hours.

On March 14, 1996, the State amended the information in response to Hudson's refusal to accept the offered plea bargain, and charged Hudson with thirty-eight additional counts of forgery. On March 21, 1996, an arraignment was held on the amended information. At the arraignment, the trial court said that it had heard from Hudson's counsel in chambers, and that the court was going to permit counsel to withdraw from the case if counsel was able to get a replacement who could try the case on the April 15, 1996, trial date. Hudson's counsel filed a motion to withdraw that same day, and the case was set for a hearing on March 27, 1996. In the motion, Hudson's counsel asserted that he was seeking to withdraw because Hudson had failed to pay him for his past services, and because counsel was "unable to forward expenses necessary for investigative services as may be required."

On March 27, 1996, Hudson's counsel and a public defender, who had been appointed on March 25, 1996, appeared for the hearing on the motion to withdraw. Hudson's counsel, however, failed to request that Hudson be produced for the hearing; therefore, the trial court did not entertain the motion to withdraw. The public defender said that she would be unable to attend a hearing on the motion during the next week because she was going on vacation; she suggested that the substitution of counsel be accomplished by getting Hudson to sign a

consent to the substitution of counsel. The trial court indicated that it would permit the substitution in that manner.

Hudson refused to consent to the substitution of counsel, and the parties, along with the appointed public defender, appeared before the trial court again on April 11, 1996. Hudson's counsel first addressed the court regarding his motion to withdraw, and told the court that he never intended to try the case. He said that Hudson had told him that he was going to retain private counsel to take over the case. The trial court asked if the public defender was ready to proceed to trial on April 15, 1996. The public defender responded that she had received from Hudson's counsel all of the information he had on the case, and that she had spoken to Hudson, but he was unwilling to cooperate with her.

The trial court reiterated that it would not permit Hudson's counsel to withdraw unless a substitute counsel was prepared to proceed on the set trial date. Hudson's counsel then said that he was seeking withdrawal both because Hudson had not paid him, and because the relationship between counsel and Hudson had "deteriorated to a point where I cannot effectively represent him." Hudson's counsel further said: "There is a lack of the necessary cooperation. Mr. Hudson has a fundamentally different view of the case than I do, strategy and tactics." The trial court asked Hudson if he agreed with his counsel's representation of the facts, and Hudson responded that his family had attempted to pay counsel, but that counsel said not to worry about the payments. Hudson's counsel eventually agreed that Hudson's family had attempted to pay him, and asserted that the main reason he was seeking to withdraw was because he had a conflict with Hudson that made him unable to represent Hudson adequately. Hudson asked his counsel if the conflict to which he referred was their disagreement about whether Hudson should accept the plea. Counsel responded

that that was not the conflict to which he was referring. Counsel explained that Hudson was attempting to direct the case himself, and to have counsel act as co-counsel. Counsel further explained that he believed Hudson was attempting to create an ineffective-assistance-of-counsel claim for appeal, and that Hudson was hampering his ability to prepare for the case by refusing to give him information regarding witnesses. The trial court permitted Hudson's counsel to withdraw based upon counsel's representations to the court, and accepted the public defender as Hudson's appointed counsel.

The trial court vacated the set trial date because the public defender was not prepared to proceed on that date. The trial court then set a motion hearing on May 21, 1996, to hear the motions that Hudson's counsel had filed at Hudson's insistence. The new trial date was to be set at the motion hearing, and Hudson was to retain a new private attorney by that hearing, if he chose to do so. When the trial court set the motion hearing, Hudson asked about his right to a speedy trial. The trial court responded that the trial had to be reset outside the ninety-day statutory period because Hudson's counsel had withdrawn from the case.¹

Hudson's public defender did not appear for the May 21, 1996 motion hearing. Nonetheless, Hudson's trial was scheduled for September 9, 1996. On May 22, 1996, Hudson's public defender appeared before the court on a motion to withdraw due to "irreconcilable differences." The public defender

¹ Section 971.10(2)(a), STATS., provides, in relevant part: "The trial of a defendant charged with a felony shall commence within 90 days from the date trial is demanded by any party in writing or on the record." Pursuant to § 971.10(4), STATS., the sole remedy for a statutory speedy trial violation is discharge from custody prior to trial. See *Day v. State*, 60 Wis.2d 742, 744, 211 N.W.2d 466, 467 (1973). A violation of the constitutional right to a speedy trial is not measured by the statutory ninety-day period. See *Beckett v. State*, 73 Wis.2d 345, 347, 243 N.W.2d 472, 474 (1976).

indicated that a new public defender would be appointed if she were permitted to withdraw. The trial court granted the motion to withdraw and retained the September trial date. Upon hearing the September trial date, Hudson again asked about his right to a speedy trial. The trial court again informed Hudson that the trial had been reset because his first counsel withdrew from the case. The following colloquy then occurred:

THE DEFENDANT: Well, I'm prepared. I have a right to defend myself; right; is that true?

THE COURT: Sure. You have a right to defend yourself.

THE DEFENDANT: Am I being granted that right? I'm prepared to go to trial on [June] 4th.

THE COURT: There is no date on the 4th.

THE DEFENDANT: I requested to exercise my right to a speedy trial in March and the Court granted that date. It was set for June 4th.

THE COURT: Was there any date in the record that shows that there is a June 4th date?

THE CLERK: No.

The trial court then set the case for a status hearing on June 6, 1996.

Neither Hudson nor his new public defender appeared on June 6, 1996. The trial court's clerk, however, spoke to the new public defender on the phone, and confirmed that he could proceed to trial on the September 9, 1996 trial date. On September 9, 1996, Hudson was not produced for court, and the trial court reset the trial for January 21, 1997. On December 12, 1996, Hudson filed a *pro se* motion demanding a speedy trial.

On January 7, 1997, Hudson's second public defender filed a motion to withdraw from the case. In the motion, the public defender cited the following grounds for withdrawal:

1. Counsel and Mr. Hudson have had a complete breakdown of communication, Mr. Hudson now refuses to communicate in any form with counsel.
2. Mr. Hudson is now convinced that counsel is either a police officer or working with the police and the District Attorney[']s Office, rendering any attorney [/] client contact impossible as well as rendering counsel totally ineffective.
3. That at their last meeting, the guards were concerned for counsel[']s safety based on what had occurred, and based on their comments to counsel after Mr. Hudson “abruptly” left the meeting at Racine Correctional Institution.
4. That counsel has informed Mr. Hudson that the appointment of new counsel would necessitate a delay and Mr. Hudson is aware of that fact but still requests new counsel.
5. That due to the complexity of this 55 count case involving expert witnesses for fingerprint, and handwriting experts, as well as multiple witnesses, that counsel could not operate effectively even as standby counsel due to the fact that Mr. Hudson could not in any likelihood understand the complexities of this case, and counsel has some doubts whether Mr. Hudson can read well enough to understand all of the discovery.
6. That counsel has talked with the Public Defender[']s Office and due to the circumstances, they will appoint another counsel, which will avoid the problems inherent in trying a case where the defendant represents himself.
7. That for the above reasons as well as the fact that 15 days before trial counsel still has not received all of the discovery, specifically a video tape seized during a search as well as fingerprint evidence, although the district attorney is trying to comply with counsel[']s discovery requests.
8. In the interests of Justice.

(Underlining in original.) A hearing was held on the motion to withdraw on January 10, 1997. At the hearing, Hudson’s second public defender restated several of the concerns listed in his motion, and said that the Public Defender’s Office was willing to appoint another new public defender because of the

circumstances of the first public defender's withdrawal.² After a long discussion with the public defender, the trial court questioned Hudson about his position on the motion to withdraw. Hudson said that he wanted the public defender to withdraw from the case. The trial court reluctantly granted the request to withdraw, stating, "I do so reluctantly because I think the defendant is trying to manipulate these proceedings[,] quite frankly[,] and willfully failing to get along with his appointed counsel in this case." The trial was subsequently reset for March 17, 1997.

Hudson and his third appointed public defender appeared before the court on February 25, 1997, for a pretrial conference. At that time, the court addressed Hudson's December 1996 *pro se* motion demanding a speedy trial. The trial court found that there was cause to set the trial outside the statutory ninety-day period because Hudson approved the withdrawal of his counsel after he made his speedy trial demand.

On the March 17, 1997 trial date, Hudson's counsel informed the court that he had contacted the investigator who had been hired by the prior public defender for Hudson's case, but that the investigator's file was empty. Hudson's counsel further informed the court that he was nonetheless prepared for trial, and that Hudson insisted on going to trial. That same day, Hudson filed a *pro se* motion to dismiss the case, alleging that he had been denied his right to a speedy trial. The trial court denied the motion to dismiss, and Hudson's trial started on March 17 and lasted through March 21, 1997. At the trial court's request, due to

² Hudson's second public defender said that he had spoken to the first public defender, and that she indicated that she withdrew from the case because it was too complex for her to handle.

time restraints, the State tried Hudson on only fourteen of the fifty-five counts set forth in the amended complaint. The jury found Hudson guilty on all fourteen counts, and the trial court entered judgment accordingly.

On November 26, 1997, Hudson filed a postconviction motion raising the same issues he now raises on appeal. The trial court denied Hudson's motion without a hearing.

DISCUSSION

Hudson argues that his forgery convictions should be vacated and the complaint against him should be dismissed because, he alleges, he was denied his constitutional right to a speedy trial. We disagree.

The right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and Article I, section 7 of the Wisconsin Constitution.³ Whether a defendant has been denied his or her right to a speedy

³ The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Article 1, section 7 of the Wisconsin Constitution provides:

Rights of accused. SECTION 7. In all criminal prosecutions, the accused shall enjoy the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf; and in prosecution by indictment, or information, to a speedy public trial by an impartial jury of the county or district

(continued)

trial is a constitutional question, which we review *de novo*. See *State v. Ziegenhagen*, 73 Wis.2d 656, 664, 245 N.W.2d 656, 660 (1976). The trial court’s underlying findings of historical fact, however, are upheld unless they are clearly erroneous. See *State v. Clappes*, 136 Wis.2d 222, 235, 401 N.W.2d 759, 765 (1987); § 805.17(2), STATS.

Under both the Wisconsin Constitution and the United States Constitution, in determining whether a defendant has been denied his or her right to a speedy trial, a court must consider: (1) the length of the delay; (2) the reason for the delay, i.e., whether the government or the defendant is more to blame for the delay; (3) the defendant’s assertion of his right; and (4) prejudice to the defendant. See *Doggett v. United States*, 505 U.S. 647, 651 (1992); *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *Day v. State*, 61 Wis.2d 236, 244, 212 N.W.2d 489, 493 (1973). The first factor, the length of the delay, is a threshold consideration, and the court must determine that the length of the delay is presumptively prejudicial before inquiry can be made into the remaining three factors. See *Doggett*, 505 U.S. at 651–652 (“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.”); *Hatcher v. State*, 83 Wis.2d 559, 566–567, 266 N.W.2d 320, 324 (1978). If the length of the delay is presumptively prejudicial and the court determines that, under the totality of the circumstances, the defendant has been denied the right to a speedy trial, the court must dismiss the charges. See *Barker*, 407 U.S. at 522, 533.

wherein the offense shall have been committed; which county or district shall have been previously ascertained by law.

As noted, the complaint charging Hudson was filed on December 5, 1995, and Hudson's trial began almost sixteen months later, on March 17, 1997.⁴ The length of this delay is presumptively prejudicial. *See Green v. State*, 75 Wis.2d 631, 635, 250 N.W.2d 305, 307 (1977) (concluding that an almost twelve-month delay was presumptively prejudicial); *cf. 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.”). We, therefore, must examine the factors set out in *Barker*, and determine whether, under the totality of the circumstances, Hudson's speedy trial rights were violated.

The record discloses that Hudson continuously asserted his right to a speedy trial. We conclude, however, that Hudson was to blame for a significant amount of delay leading up to his trial, and that Hudson was only minimally prejudiced by the delay. Therefore, we conclude that, under the totality of the circumstances, Hudson's speedy trial rights were not violated.

As noted, Hudson's trial was initially scheduled to begin on April 15, 1996, about four months after the complaint was filed. This four-month period was necessary to permit both Hudson and the State to prepare for trial. *See*

⁴ Hudson argues that the length of the delay is to be measured from the issuance of the complaint rather than the filing of the complaint. We disagree. Speedy trial rights do not attach until a defendant is “indicted, arrested or otherwise officially accused.” *State v. LeMay*, 155 Wis.2d 202, 209, 455 N.W.2d 233, 236 (1990). In Wisconsin, criminal proceedings do not commence, and thus a defendant is not officially accused, until a complaint has been filed. *See* § 967.05(1), STATS. (a prosecution may be commenced by the filing of a complaint, information or indictment); § 968.02(2), STATS. (“After a complaint has been issued, it shall be filed with a judge and either a warrant or summons shall be issued or the complaint shall be dismissed Such filing commences the action.); *see also LeMay*, 155 Wis.2d at 210, 455 N.W.2d at 236 (a defendant formally becomes the accused, and speedy trial rights attach, when the complaint is filed and a warrant is issued).

Norwood v. State, 74 Wis.2d 343, 354, 246 N.W.2d 801, 808 (1976) (the passage of a reasonable amount of time attributable to the “ordinary demands of the judicial system” does not support a defendant’s claim that he or she has suffered a speedy trial violation). However, Hudson’s privately retained counsel withdrew, causing the trial to be rescheduled to September 9, 1996, five months later than the original trial date. The trial court permitted Hudson’s counsel to withdraw based on counsel’s representations that Hudson had created an irreconcilable conflict by refusing to cooperate with counsel, and by withholding information regarding witnesses. Hudson is, therefore, responsible for the five-month delay resulting from the withdrawal of his privately retained counsel.

Hudson’s trial also did not take place on the second scheduled trial date because Hudson was not produced for trial. The trial was then reset for January 21, 1997. Hudson was not at fault for this additional four and one-half month delay, and it is therefore weighted against the State in determining whether Hudson’s speedy trial rights were violated. The trial did not take place on January 21, 1997, but was reset for March 17, 1997, because Hudson’s actions again caused his attorney to withdraw from the case. As noted, Hudson refused to cooperate with his public defender, and sought to have him removed from the case. Hudson is, therefore, responsible for the two-month delay caused by the withdrawal of his public defender. Thus, Hudson is responsible for delaying his trial by a total of seven months. In reviewing the lengths of and the reasons for the various delays, we conclude that Hudson is more to blame for the delays than is the State.

Hudson asserts that he was prejudiced by the delay because he allegedly suffered anxiety and concern over the impending charges, and because he allegedly was denied placement at a less restrictive facility based on the

unresolved charges. Hudson does not assert that his ability to defend against the forgery charges was prejudiced by the delay in bringing him to trial. Apart from his placement argument, Hudson also does not assert that he suffered oppressive pretrial incarceration as a result of the delay in bringing him to trial. Indeed, the record discloses that Hudson was already in custody serving a sentence on another charge. *See Doggett*, 505 U.S. at 654 (unreasonable delay may prejudice defendant by producing oppressive pretrial incarceration, anxiety and concern of the accused, and an impaired defense due to dimming memories and loss of exculpatory evidence). We conclude that the prejudice that Hudson claims to have suffered is minimal, and that, under the totality of the circumstances, Hudson's speedy trial rights have not been violated.

Hudson next argues that he was denied his constitutional right to represent himself at trial. He claims that he asserted his right to self-representation on May 22, 1996, when his first public defender withdrew from the case, and again on the morning of the third day of his trial. We conclude that Hudson was not denied his right to self-representation.

“[A] defendant in a criminal trial has an independent constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so.” *Hamiel v. State*, 92 Wis.2d 656, 670, 285 N.W.2d 639, 648 (1979). Before permitting a defendant to proceed without counsel, the trial court must determine that the defendant has intentionally relinquished the right to representation by counsel. *See State v. Johnson*, 184 Wis.2d 324, 343, 516 N.W.2d 463, 469 (Ct. App. 1994). “This determination rests upon the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused.” *Id.* Whether a defendant was denied the constitutional right to self-

representation is an issue of constitutional fact that we review without deference to the trial court. *See id.*

As noted, on May 22, 1996, Hudson referred to his right of self-representation when asserting his right to a speedy trial. Hudson's colloquy with the trial court makes clear that Hudson's main desire was to proceed to trial on June 4, 1996, despite the fact that his counsel was withdrawing. The trial court, however, informed Hudson that his trial was not scheduled for June 4, and thus the trial court did not reach the issue of whether Hudson should be permitted to represent himself. Hudson did not unequivocally assert his right to self-representation, but was attempting only to proceed to trial on a specific date. The trial court's response to Hudson's inquiry, therefore, did not violate Hudson's right to self-representation. *See Keller v. State*, 75 Wis.2d 502, 509, 249 N.W.2d 773, 777 (1977) (the trial court has a duty "to refuse to allow a defendant to proceed without counsel where the defendant is incapable of making or has not unequivocally made such a decision"). This conclusion is further supported by the fact that Hudson did not thereafter raise the issue of self-representation until March of 1997, on the third day of his trial.

On the morning of the third day of trial, Hudson's counsel informed the court that Hudson did not want to participate in the proceedings, and that Hudson requested to be returned to prison. The trial court denied Hudson's request. Thereafter, during the testimony of a witness for the State, Hudson's counsel requested a sidebar and informed the court that Hudson wanted to fire counsel and represent himself. The trial court denied Hudson's request to represent himself, explaining that the request could not be granted during the middle of a trial. When the trial adjourned for lunch, Hudson's counsel told the court that Hudson did not want to be in the courtroom for the remainder of the

trial. When the parties returned from the lunch break, however, Hudson renewed his request to represent himself. The trial court denied Hudson's request, again stating that it could not grant the request during the middle of the trial. The trial then proceeded in Hudson's presence.

In its order denying Hudson's motion for postconviction relief, the trial court further explained that it denied Hudson's belated requests to proceed without counsel because the requests were made in an attempt to "manipulate the proceedings." The trial court also explained that it refused Hudson's mid-trial request to represent himself because the case was complex, and the trial was to proceed within a limited time frame. *See Hamiel*, 92 Wis.2d at 672–673, 285 N.W.2d at 649 (in ruling on a defendant's request to proceed *pro se*, the trial court should consider the timing of the request and the effect of granting the request on the orderly administration of justice). Indeed, the record reveals that Hudson was being tried on fourteen counts of forgery, and that ten witnesses had yet to testify for the State. We conclude that the trial court properly denied Hudson's mid-trial request to represent himself. A defendant is not entitled to belatedly assert the right to self-representation to obstruct the orderly administration of justice. *See id.*

Hudson's final claim is that the trial court denied him his constitutional right to representation by counsel of his choice when it allowed his privately retained counsel to withdraw from the case. We disagree.

The Sixth Amendment right to counsel includes a qualified right to representation by counsel of the defendant's choice. *See State v. Miller*, 160 Wis.2d 646, 652, 467 N.W.2d 118, 119 (1991). This right is not absolute, and it may be overcome by legitimate countervailing interests such as the defendant's right to adequate representation and the preservation of the integrity of the

adversarial process. *See id.*, 160 Wis.2d at 652–654, 467 N.W.2d at 119–120. A trial court may, in the proper exercise of its discretion, permit counsel to withdraw for good cause, such as a complete breakdown in communication or an irreconcilable conflict between counsel and the defendant. *See State v. Robinson*, 145 Wis.2d 273, 279, 426 N.W.2d 606, 609 (Ct. App. 1988).

The record reveals that the trial court extensively examined both Hudson and his privately retained counsel regarding counsel’s motion to withdraw. The trial court eventually permitted counsel to withdraw based on counsel’s representations that he was unable to adequately represent Hudson. As noted, counsel informed the court that Hudson was hampering his ability to prepare the case by refusing to give him information regarding witnesses, and that he believed Hudson was attempting to create an ineffective-assistance-of-counsel claim. Under these circumstances, Hudson’s right to adequate representation and the need to preserve of the integrity of the adversarial process overcame Hudson’s right to representation by counsel of choice. *See Miller*, 160 Wis.2d at 652–654, 467 N.W.2d at 119–120. The trial court properly exercised its discretion when it permitted counsel to withdraw. *See Robinson*, 145 Wis.2d at 279, 426 N.W.2d at 609.

By the Court.—Judgment and order affirmed.

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

