COURT OF APPEALS
DECISION
DATED AND FILED

January 19, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1710-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BURLEY HARDING,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RONALD S. GOLDBERGER, Judge. *Reversed and cause remanded with directions.*

CURLEY, J.[1] Burley Harding appeals from a judgment of conviction for operation of a motor vehicle while intoxicated and operation of a motor vehicle with a prohibited alcohol concentration, contrary to § § 346.63(1)(a)

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

& (b), STATS., and from an order denying him postconviction relief. He claims that the 8-1/2 year delay between his arrest and his trial denied him his constitutional right to a speedy trial.[2] This court agrees and the judgment of conviction is accordingly reversed.[3]

I. BACKGROUND.

On February 12, 1989, Harding was arrested for operation of a motor vehicle while intoxicated and operation of a motor vehicle with a prohibited alcohol concentration. Harding had no previous offense of this nature and was thus charged with civil forfeiture violations. The civil forfeiture violations were still pending when, in 1993, Harding was arrested and convicted in West Virginia for operating a motor vehicle while under the influence of an intoxicant. Based on Harding's West Virginia conviction in April 1994, five years after his Milwaukee County arrest, Harding's pending charges in Wisconsin were reissued as state charges. The State viewed Harding's conviction in West Virginia, which took place after the Milwaukee County offenses, as his first conviction, thus treating the February 12, 1989 Milwaukee County offense as a second offense within five years, exposing Harding to criminal penalties.

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[2] Harding asserts his federal constitutional right to a speedy trial, as distinguished from his statutory right in Wisconsin, found in § 971.10, STATS. Under this statute, the remedy to a speedy trial violation after a demand for a speedy trial is pre-trial release from custody. *See* § 971.10, STATS. (a defendant must be brought to trial within 60 days for a misdemeanor and 90 days for a felony); ***Day v. State***, 61 Wis.2d 236, 212 N.W.2d 489 (1973).

[3] Harding also claims that his motion for a mistrial should be granted because the State violated a sequestration order in the trial. Because the conviction is reversed on speedy trial grounds, this issue will not be addressed. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

Between February 12, 1989, and spring of 1994, the record is silent as to why the underlying civil forfeiture action was delayed for five years. After the state charges were issued, a motion challenging the stop was commenced on October 31, 1995 which was continued until February 27, 1996. This continuance was granted both because the State needed to call an additional witness who was not present, and Harding's business obligations made it difficult for him to appear before that date. In February, the hearing was then adjourned to September 27, 1996, at which time the motion was denied. There is no explanation given in the record for the delay between February 1996, the original date for the continued motion, and September 1996, when the motion was concluded. A trial date was scheduled for February 1997 but the trial did not commence until September 15, 1997. The record reflects that the delay occurring between the original trial date in February 1997 and the actual trial date in September 1997 was the result of defense attorney being ill in February 1997 and his having conflicting dates in his schedule. The case finally went to trial after eight or nine judges had presided over the case and had granted twenty-four adjournments. After a jury trial, Harding was convicted of both counts.

II. ANALYSIS.

Harding contends his constitutional speedy trial right was denied by the 8-1/2 year delay between his arrest and his conviction and requests dismissal of his case. The constitutional right to a speedy trial is found in the Sixth Amendment to the United States Constitution and Article 1, § 7 of the Wisconsin Constitution.[4] Whether a defendant has been denied his or her speedy trial right is

[4] The Sixth Amendment of the United States Constitution provides:

(continued)

a constitutional question, which this court reviews *de novo*. *See* ***State v. Ziegenhagen***, 73 Wis.2d 656, 664, 245 N.W.2d 656, 660 (1976). Under the United States and Wisconsin Constitutions, to determine 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 or her 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 whether the length of delay is presumptively prejudicial before the inquiry can be made into the remaining factors. *See* ***Doggett***, 505 U.S. at 651-52 ("Simply to trigger a speedy trial analysis, an accused

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

Article 1, § 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 prosecutions by indictment, or information, to a speedy and public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law.

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, 566-67, 266 N.W.2d 320, 324 (1978); s*ee also* ***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."). If the length of 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. The length of the delay is measured beginning at an arrest, indictment or other official accusation. *See* ***Doggett***, 505 U.S. at 655.

The State argues that the speedy trial inquiry must begin at the time Harding was criminally charged with this offense, in April 1994, rather than February 1989, claiming a defendant has no right to a speedy trial in a civil action. However, following the dictates of ***Doggett***, the time must be measured from the date of Harding's arrest as this is a criminal action and it began when he was arrested in 1989. *See* ***Doggett***, 505 U.S. at 655. Consequently, the State's argument is rejected. Thus, the speedy trial inquiry must begin on February 12, 1989, when Harding was arrested for operating a motor vehicle while under the influence of an intoxicant and operating a motor vehicle with a prohibited alcohol concentration. The trial took place September 15, 1997, which calculates to an 8-1/2 year delay. This amount of time is clearly presumptively prejudicial. *See* ***Doggett***, 505 U.S. at 652 (where an 8-1/2-year delay between the indictment and arrest was considered presumptively prejudicial because it was an "extraordinary lag" that "clearly suffices to trigger the speedy trial [i]nquiry"). Having determined that the delay is presumptively prejudicial, the analysis continues.

The second factor to be considered is the reason advanced for delay.

> A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.

Barker, 407 U.S. at 531. The State cannot account for the five-year delay between the time of the arrest and the time the charges were dismissed and reissued. There is no record to indicate what activity, if any, took place before the criminal charges were reissued.[5] Likewise, there is no evidence that this delay can be attributed to the defendant. In the absence of any evidence indicating who was at fault, the fault of this delay must fall on the State as "[a] defendant has no duty to bring himself to trial, the State has that duty." ***Barker***, 407 U.S. at 527.

An examination of the remaining time reveals that the three-year delay between the time of the criminal charge, April 1994, and the time of trial, September 1997, occurred for reasons that can be charged to both the State and to Harding. In the postconviction proceeding, the trial court noted that the case was old due to fault of all the parties ("[T]his court at least concluded that all parties … could take some responsibility for its age."). The trial court also remarked, in discussing the age of the case, "I think I'm sure we're all hopeful if the public were not to review this record in this case." In denying the State's motion for an adjournment heard on the trial date, the trial court noted that eight or nine judges had presided over the matter and that there appeared to have been twenty-four

[5] Apparently the State's file was lost after Harding was charged with the two criminal convictions, resulting in a partially reconstructed file being used during the pendency of this action in the circuit court.

adjournments. Since the initial delay was over five years and must be charged to the State, even if the remaining delay falls equally on both Harding and the State, this factor weighs in favor of Harding.

The next factor in the analysis is whether the defendant asserted his or her right to a speedy trial. This factor weighs strongly in the analysis. *See* ***Barker***, 407 U.S. at 531. In this case, there is nothing in the record to indicate that Harding demanded a speedy trial. While this factor weighs against Harding, it does not end the analysis.

The fourth factor, whether there is prejudice to the defendant is to be assessed in light of the defendant's interests which the speedy trial right was designed to protect. ***Barker***, 407 U.S. at 532. These interests include, but are not limited to: (1) preventing oppressive pretrial incarceration; (2) minimizing anxiety and concern of the accused; and (3) guarding against the possibility that the defense will be impaired. ***Id.***

The first interest does not apply to this case because Harding was not incarcerated. However, the fact that Harding was not incarcerated does not take away from the fact that during the 8-1/2 years the case was pending he may have experienced a certain amount of anxiety and concern, the second interest the speedy trial right was designed to protect. "Even if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility." ***Barker***, 407 U.S. at 533. Surely contributing to this anxiety and concern was the fact that this offense changed from a civil forfeiture to a criminal offense during the delay. In fact, it can be argued that the delay harmed Harding as his offense was transformed into a criminal one because the Wisconsin case was not resolved in a timely fashion

before the West Virginia arrest. Further, Harding was not only subjected to criminal punishment for offenses that were only civil offenses when committed because of the delay, but he also was faced with the prospect of going to trial to confront witnesses whose recollections were diminished. Harding claims these diminished memories impaired the defense, a result the speedy trial right seeks to prevent, as shown by the third interest in ***Barker***. This court agrees. Harding went to trial prepared to defend against testimony he heard at his motion hearing in 1995 regarding the events which led to his arrest. Testimony of one of the officers at the scene varied drastically from that given at the motion hearing.

> DEFENSE COUNSEL: Okay, now do you recall having testified back in October of 1995, in proceedings associated with this matter?
>
> WITNESS: I remember testifying, but I would need to review the motion in order to remember what it was I said.
>
> DEFENSE COUNSEL: Let me just ask you if you recall being asked these questions and giving these answers, okay?
>
> …
>
> …"Question: Now at the time you first – strike that. What brought Mr. Harding to your attention on that day?
>
> Answer: Myself, I was driving the squad and Sergeant Ziebel was in the passenger seat. We were coming southbound on Port Washington Road and about to take a right-hand turn to go westbound on South Silver Spring when we observed a vehicle coming down the exit ramp of I-43 …." Do you remember being asked that question and providing that answer?
>
> WITNESS: Yes, as I stated yesterday, there were some similar cases that I had witnessed over the course of my time with the department ….
>
> DEFENSE COUNSEL: So, … what is it about yesterday that enables you to now recall that you were sitting in a parking lot directly east of Mr. Harding at the point in time when he allegedly spun out, as opposed to being at the corner of Silver Spring and Port Washington Road about to take a right-hand turn onto Silver Spring with you driving the squad?

The record also contains further examples of this witness's poor recollection of the events given in her testimony. Not only was she unable to recall where she was when she first saw Harding, she also could not recall whether she was in a car with the other officer or alone. She also could not recall whether either officer administered any field sobriety tests. Another State's witness candidly admitted to having a poor memory. The officer who administered the breath test at the police station stated he could not identify Harding as the man to whom he gave the test.

> PROSECUTOR: So you're saying you first saw the defendant in the garage?
>
> WITNESS: Yes, sir.
>
> PROSECUTOR: Do you also see him here in the courtroom today?
>
> WITNESS: I believe that's the defendant right there … I wouldn't know him to be Burley Harding. *It's been too long*.

(Emphasis added.) Plainly the extraordinary span of time between the arrest and trial hampered the State's witnesses' ability to clearly remember the events surrounding Harding's arrest. This fact impacted adversely on the defense because it was nearly impossible for him to prepare an effective defense with witnesses who could not recall with certainty the events who led to his arrest and who testified at trial in a manner inconsistent with their earlier testimony. "The inability of the defense to prepare his case skews the fairness of the entire system." ***Barker***, 407 U.S. at 532. A defense may be impaired when witnesses die or disappear, when witnesses are unable to accurately recall facts because of the passage of time, and when a defendant is hindered in his ability to contact witnesses or gather evidence, or is otherwise impaired. *See* ***id.***

Thus, this fact prejudiced the appellant in a manner which the speedy trial right is designed to protect.

Thus, under a totality of the circumstances analysis, this court concludes that Harding's right to a speedy trial was denied. The factors which weigh in his favor are: the extraordinary length of the delay, 8-1/2 years; the fact that the first five years is all attributable to the State, and the remainder of the time is attributable to both Harding and the State; the actual prejudice Harding suffered when the delay resulted in criminal charges being brought against him; and further prejudice he suffered because of the impairment of his defense due to the forgetfulness of the State witnesses. Consequently, the judgment and the order denying him postconviction relief are reversed, and this case is remanded with directions to vacate the judgment of conviction and dismiss the case with prejudice.

By the Court.—Judgment and order reversed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.