COURT OF APPEALS
DECISION
DATED AND FILED

February 21, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-2878-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

STEVEN S. WALTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed.*

¶1 NETTESHEIM, J.[1] In January 1999, when the State learned that Steven S. Walter's 1997 municipal court conviction for operating while intoxicated (OWI) was, in fact, his second OWI offense, the municipal court

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

vacated the conviction, and the State followed with the instant criminal complaint charging Walter as a second-time OWI offender. A jury found Walter guilty and Walter appeals from the ensuing judgment of conviction. Walter contends that the belated charging in this case violated his federal and state constitutional right to a speedy trial. We affirm the trial court's ruling that the delay did not violate any of Walter's constitutional rights.

¶2 Walter also challenges the trial court order denying his motion to suppress the results of a blood test. He contends that the warrantless seizure of blood from his person was unconstitutional. However, Walter concedes that ***State v. Thorstad***, 2000 WI App 199, 238 Wis. 2d 666, 618 N.W.2d 240, has decided this issue against him. He raises this issue only to preserve it for any future appellate review. Therefore, we affirm the trial court's order denying Walter's motion to suppress without further comment.

FACTS

¶3 The relevant facts are not in dispute. On June 7, 1997, Officer Michael Cummins of the Village of Darien Police Department arrested Walter for OWI and issued him a municipal citation for the offense. The matter was prosecuted in the Village of Darien Municipal Court where Walter did not contest the charge and a forfeiture penalty was imposed. The parties concede that this matter should have been referred to the Walworth County District Attorney for prosecution as a criminal second offense since Walter had a prior OWI conviction on his record.

¶4 On May 8, 1998, Walter was again arrested for OWI. This matter was charged as a third-time offense based on the two prior convictions. Walter challenged the prior Village of Darien conviction. Relying on ***County of***

Walworth v. Rohner, 108 Wis. 2d 713, 324 N.W.2d 682 (1982), Walter argued that the municipal court did not have subject matter jurisdiction to prosecute the Village of Darien matter as a second offense. The trial court agreed and the complaint was amended to allege a second offense. In due course, Walter was convicted as a second-time OWI offender.

¶5 Based on these developments, the State arranged to have the Village of Darien Municipal Court vacate the OWI judgment. The State then prosecuted Walter in this matter under a criminal complaint issued on January 8, 1999. This complaint charged Walter as a third-time offender. Walter pled not guilty and requested a jury trial. During the trial, the court learned that one of the "prior" convictions was premised on an offense that occurred after the offense in this case. Thus, the trial court amended the complaint to allege a second OWI offense.

¶6 Prior to trial, Walter filed a number of motions to dismiss based on a variety of grounds, including a double jeopardy claim. However, he did not ask for a speedy trial. On July 19, 1999, the day before the jury trial, Walter moved to dismiss, claiming that he had been denied a speedy trial. The trial court took the motion under advisement. Following the jury's guilty verdict and sentencing, the court denied the speedy trial motion in a written decision. Walter was sentenced as a second-time OWI offender, and he appeals from the judgment of conviction.

DISCUSSION

¶7 Walter claims a violation of his federal and state constitutional right to a speedy trial. We review a constitutional question of law on a de novo basis. *See* ***State v. Ziegenhagen***, 73 Wis. 2d 656, 664, 245 N.W.2d 656 (1976). Despite our de novo review, we value a trial court's decision on such a matter.

Scheunemann v. City of West Bend, 179 Wis. 2d 469, 475, 507 N.W.2d 163 (Ct. App. 1993).

¶8 The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. CONST. amend. VI. This constitutional protection applies to the states through the Fourteenth Amendment. ***State v. Borhegyi***, 222 Wis. 2d 506, 509, 588 N.W.2d 89 (Ct. App. 1998). The Wisconsin Constitution, article I, section 7, provides, "In all criminal prosecutions the accused shall enjoy the right … in prosecutions by indictment, or information, to a speedy public trial…." WIS. CONST. art. I, § 7.

¶9 A determination of whether the defendant's right to a speedy trial was violated depends upon a balancing approach in which the conduct of both the prosecution and the defense are weighed. ***Day v. State***, 61 Wis. 2d 236, 244, 212 N.W.2d 489 (1973). Relying on ***Barker v. Wingo***, 407 U.S. 514, 530 (1972), the ***Day*** court said, "Some of the factors which the court should assess in applying the balancing approach consist of the following: the length of delay, the reason for the delay, the defendant's assertion of the right and the prejudice to the defendant." ***Day***, 61 Wis. 2d at 244. The supreme court's use of the word "some" signals that these factors are not necessarily exclusive. This is supported by other language from ***Barker***:

> [T]he right to [a] speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate…. It is impossible to do more than generalize about when those circumstances exist.… Thus … any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case.

Barker, 407 U.S. at 521-22. With these principles in mind, we turn to this case.

1. Length of the delay

¶10 Before we specifically consider the length of the delay factor, we address Walter's related argument that if the length of the delay is found to be presumptively prejudicial, the discussion ends and we may not probe further. We disagree. Walter cites no authority for this proposition. And the cases which have found a presumptively prejudicial delay have proceeded to examine other relevant factors. *See, e.g.,* ***Borhegyi***, 222 Wis. 2d at 512 ("We conclude that this seventeen-month delay is presumptively prejudicial, and we therefore proceed in our analysis of the remaining ***Barker*** factors."). In fact, the rule is just the reverse of that for which Walter argues. "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." ***Barker***, 407 U.S. at 530; *see also* ***Borhegyi***, 222 Wis. 2d at 510.

¶11 We now turn to the specific delay in this case. Walter's speedy trial right commenced with his arrest on June 7, 1997. ***Borhegyi***, 222 Wis. 2d at 511. He was not charged until January 8, 1999, and was not tried until July 20, 1999. In round figures, these represent delays of nineteen months and twenty-six months, respectively. Generally, the courts have found a delay of a year or more to be presumptively prejudicial. ***Id***. at 512; *see also* ***Doggett v. United States***, 505 U.S. 647, 652 n.1 (1992); ***Green v. State***, 75 Wis. 2d 631, 636, 250 N.W.2d 305

(1977). Under that benchmark, the delay in this case qualifies as presumptively prejudicial.[2]

2. Reason for the delay

¶12 Walter challenges the trial court's observation that the principal fault for the delay lay with the Village of Darien Police Department, not the district attorney, in mistakenly charging him with a forfeiture offense. Walter says that it was improper for the court to absolve the district attorney in this fashion. Instead, he argues that we should treat the prosecutorial unit on a global basis and include all the actors in the legal process.

¶13 We have no particular quarrel with the premise of this argument. In other cases, the State has been charged with the responsibility for a delay even though it was not directly responsible for it. For instance, in ***Ziegenhagen***, a clerical error in the clerk of court's office was visited upon the State.[3] ***Ziegenhagen***, 73 Wis. 2d at 667. And in ***Green***, an overburdened court system that contributed to the delay was charged to the State. ***Green***, 75 Wis. 2d at 637.

¶14 But simply visiting fault on the prosecutor for a delay caused by other entities in the legal system does not fully answer the analysis under this factor. This is because the ultimate inquiry is on *the reason* for the delay. ***Barker*** sheds some light on this inquiry:

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[2] Relying on the statement in ***Barker v. Wingo***, 407 U.S. 514, 530 (1972), that each speedy trial claim must be assessed under its particular facts, the State argues that the delay was not presumptively prejudicial. But the State offers no argument on this point beyond its assertion. We do not address this argument.

[3] However, the district attorney in ***State v. Ziegenhagen***, 73 Wis. 2d 656, 667, 245 N.W.2d 656 (1976), also contributed to the delay.

> A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily ….

Barker, 407 U.S. at 531 (footnote omitted). Echoing this theme, our supreme court in ***Green*** said that the fault visited on the State was not to be weighed heavily because the delay was not intentional nor motivated by a desire to disadvantage the defendant. ***Green***, 75 Wis. 2d at 637.

¶15 Here, there is neither a claim nor hint of any deliberate attempt to delay the charging of Walter. Instead, the delay was caused by the failure to initially charge Walter in the proper forum. We fully agree with Walter that it is the responsibility of the Walworth County District Attorney to assure that criminal matters are referred to that office for potential prosecution. However, the record in this case demonstrates that the erroneous charging of Walter in the municipal court was, at the most, the result of negligence, miscommunication or misinformation. We also observe that the opportunity for this kind of snafu is enhanced by the distinction which Wisconsin law draws between forfeiture and criminal prosecutions for OWI offenses and by the different jurisdiction vested in the municipal courts and the circuit courts regarding OWI offenses.

¶16 Again, we do not offer these observations to excuse the State, but rather to put the matter in the proper perspective and to thereby gauge the degree of culpability on the part of the State. We conclude that the reason for the delay is properly visited upon the State, but we do not weigh this factor heavily against the State for the reasons we have stated.

3. Walter's assertion of the speedy trial right

¶17 In ***Barker***, the Supreme Court rejected the "demand waiver" doctrine which would require a defendant to demand a speedy trial or face waiver

of such right. ***Barker***, 407 U.S. at 522-29. Instead, the Supreme Court said, "[T]he better rule is that the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered …." ***Id***. at 528.

¶18 Walter concedes that he never demanded a speedy trial. But he contends that this factor should not weigh against him because the original OWI charge was promptly disposed of in the municipal court and thereafter he had no forum in which to assert the right. Furthermore, Walter observes that he had no obligation to bring himself to trial. We agree with these statements, but they miss the point.

¶19 A defendant's assertion of a speedy trial right not only tells the State that it must act with dispatch in bringing the defendant to trial, but also signals that the defendant is concerned that further delay may prejudice the defense. As ***Barker*** noted, the "deprivation of the [speedy trial] right may work to the accused's advantage." ***Id***. at 521. So a speedy trial demand puts the State on notice that the defendant does not seek to gain the potential advantage offered by delay. In short, a speedy trial request flags to the State that the defendant genuinely wants a speedy disposition of the case.

¶20 Here, it goes without saying that Walter's failure to seek a speedy trial after the municipal court proceeding and before the criminal court proceeding cannot be held against him, and we reject Walter's efforts to cast the issue in that light. But we do hold that Walter's failure to demand a speedy trial *after* he was charged in this case signals that the delay in the charging was not a matter of importance or concern to him. Moreover, Walter's failure to assert the prior municipal court proceeding as a basis for a speedy trial demand was not a matter of oversight or neglect. The municipal court proceeding had already prompted

Walter to challenge the repeater allegation in the May 8, 1998 complaint on double jeopardy grounds.

¶21 In summary, Walter had every opportunity to assert the municipal court proceeding and the ensuing delay as a basis for disposing of this case in a timely fashion. But he did not. Instead, he asserted the municipal court proceeding as a bar to further proceedings in this case. Simply stated, Walter did not want a speedy trial. Instead, he wanted no trial.

¶22 Although disavowing the "demand waiver" doctrine, ***Barker*** nonetheless holds that "[t]he defendant's assertion of his speedy trial right … is … strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." ***Id***. at 531-32. We hold this factor against Walter.

4. Prejudice to Walter

¶23 The prejudice factor addresses three concerns: (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 532.

¶24 The first factor is not in play in this case. The record does not establish that Walter was incarcerated prior to trial.

¶25 As to the second factor, Walter could not have suffered any anxiety or concern during the delay between the municipal court proceeding and this criminal proceeding since he believed that the matter had been put to rest. Instead, he contends that the filing of the instant charge disrupted that finality, thereby

causing him anxiety and concern. But again, we take note that Walter never asserted his right to a speedy trial once this matter was revived in this criminal proceeding. That tells us that the delay was not a matter of undue concern to him. We do not dispute that one facing a criminal OWI charge would be anxious or concerned. But that is not the test for purposes of this factor. Rather, the inquiry is whether the anxiety and concern are the product of the *delay*. On this point, the record does not support Walter's claim.[4]

¶26 The principal focus of Walter's prejudice argument is the third factor—the possibility that the delay has impaired the defense of the charge. Walter contends that this factor is satisfied for three reasons. First, Cummins's testimony significantly relied upon his arrest report. Second, Cummins testified at one point that if there were some details about the incident that were not in his report, he could not remember them. Third, Walter contends that his own memory had dimmed regarding the incident.

¶27 We do not deem it significant that Cummins testified with substantial assistance from his report. We see that in numerous cases where the trial occurs relatively soon after the arrest. So it is not remarkable that it occurred in this case where the passage of time between the offense and the trial is greater. Moreover, a police officer's report that is prepared shortly after the event will oftentimes be more reliable than the officer's independent recollections. That is why such reports are so valuable to defense counsel as a tool for discovery, cross-examination and possible impeachment.

[4] Walter also contends that his anxiety and concern were heightened by the fact that the criminal complaint charged him as a third-time offender when he should have been charged as a second-time offender. But the anxiety and concern relate to the level of the charge, not the fact of the delay.

¶28 Walter also argues that Cummins testified that any exculpatory information or evidence was forever lost because of Cummins's dimmed memory and because such data would not be included in Cummins's report. In support, Walter points to certain portions of his cross-examination of Cummins where Cummins conceded that his job was not to prove Walter innocent after he arrested him. However, Cummins's testimony was not as ironclad as Walter represents. During the same portion of the cross-examination, Cummins also stated that he would have included any information favorable to Walter in his report. And in response to Walter's question whether it was Cummins's "job to prove the individual innocent," Cummins responded, "It is." We find that to be a remarkable and reassuring statement from a police officer. And it gives us substantial confidence in the integrity and completeness of Cummins's report, both as to inculpatory or potentially exculpatory information.

¶29 Finally, Walter argues that the delay impaired his ability to provide his own testimony because of his dimmed memory. But Walter's dimmed memory was very selective. On direct examination, Walter testified as to why he was driving, where he was going, how late he planned to work, what he had eaten, that he had consumed beer, that he was not intoxicated, and that he was capable of operating a motor vehicle. It was only when pressed on these matters on cross-examination that Walter's memory dimmed and he invoked the passage of time as the reason for his uncertainty. We are not satisfied that the passage of time materially affected Walter's testimony or his ability to frame a defense.

CONCLUSION

¶30 We hold that trial court did not err by rejecting Walter's motion to suppress. We further hold that Walter's constitutional right to a speedy trial was not violated.

By the Court.—Judgment and order affirmed.

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