COURT OF APPEALS
DECISION
DATED AND FILED

July 13, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-1961-CR

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

PETER JAY BARTRAM,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Rock County: EDWIN C. DAHLBERG, Judge. *Reversed and cause remanded with directions.*

Before Eich, Vergeront and Deininger, JJ.

¶1 DEININGER, J. The State of Wisconsin appeals an order dismissing its action against Peter Bartram.[1] The State had charged Bartram with manufacturing a controlled substance, possessing a controlled substance with intent to deliver, and failing to comply with the drug tax stamp law, but the trial court concluded that these charges had been brought vindictively and that Bartram had been deprived "of his right to due process of law." The State contends that the trial court erred in determining that the prosecutor had engaged in "actual prosecutorial vindictiveness," and we agree that the record before the trial court was insufficient to support this factual finding. Accordingly, we reverse the order dismissing the State's action and remand for further proceedings consistent with this opinion.

BACKGROUND

¶2 This appeal arises from a series of criminal charges that the State brought against Bartram in 1998 and 1999. On March 23, 1998, members of the State Line Area Narcotics Team (SLANT) executed a search warrant at Bartram's home and found equipment and supplies associated with the manufacture of methamphetamine, and a smoking pipe which contained methamphetamine residue. Bartram admitted to one of the SLANT officers that he had been manufacturing methamphetamine for "the past two or three months" in the amount of one-quarter ounce per week. The next day, Bartram was charged with one count of manufacturing a controlled substance and one count of maintaining a dwelling for the purpose of manufacturing, keeping or delivering a controlled

[1] Under WIS. STAT. § 974.05(1)(a) (1997-98), the State is permitted to appeal any "[f]inal order or judgment adverse to the [S]tate … if the appeal would not be prohibited by constitutional protections against double jeopardy." All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

substance.[2] The manufacturing charge was later amended to a charge of possessing a controlled substance with intent to deliver.

¶3 Prior to trial, the parties attempted to negotiate a plea agreement. The State apparently tendered a plea offer that was conditioned upon Bartram pleading guilty to the two charges. When it became evident that Bartram did not intend to plead guilty, the prosecutor sent Bartram's counsel a letter informing him that the offer was revoked. The letter went on to state, "if your client fails to enter guilty pleas to the two remaining charges in the Second Amended Information … additional charges will be filed against him, regardless of the outcome of the jury trial." The letter was dated February 17, 1999.

¶4 On the morning of February 26th, the date set for trial, Bartram informed the court that he wanted to plead guilty to the drug house charge but intended to proceed to trial on the possession with intent to deliver charge. After engaging in a plea colloquy with Bartram, the court accepted his plea to the drug house charge. Bartram then directed the court's attention to the possession charge and asked the court to issue an order prohibiting the State from introducing any evidence of manufacturing without first conducting a hearing outside the presence of the jury. The State objected, but the court agreed to grant Bartram's request and stated that "[a]nything that goes into the question that [Bartram] was manufacturing … will not go before the jury without a hearing…."

¶5 At this point, the prosecutor informed the court of the contents of the February 17th letter, explained that he intended to bring additional charges against

[2] Bartram was also originally charged with one count of delivery in violation of WIS. STAT. § 961.41(1)(e), but this count was dismissed in pretrial proceedings.

Bartram because he refused to plead guilty to the possession charge, and stated that "[a]t this time, I am filing a new Criminal Complaint … alleging additional drug-related offenses." The new complaint alleged that "on or between January 1, 1998, and March 22, 1998" Bartram manufactured methamphetamine, possessed methamphetamine with intent to deliver, and failed to comply with the drug tax stamp law. The prosecutor then asked the court to conduct a hearing on the admissibility of the manufacturing evidence at the impending trial of the original possession with intent charge, explaining that "if the Court precludes the State from offering evidence of the manufacturing … I do not feel that I can meet my burden of proof." The court indicated that it was not inclined to allow the State to introduce evidence of manufacturing, and on the State's motion, the court dismissed the original possession with intent to deliver charge, without prejudice.

¶6 The State pursued the newly filed charges against Bartram. In May 1999, Bartram moved to dismiss the charges on the grounds that the prosecutor acted vindictively "in violation of [Bartram's] right to due process of law" when he urged Bartram to plead guilty to the original two charges and threatened to file additional charges if Bartram decided to proceed to trial. After conducting a hearing on the issue, the court agreed that the State had acted vindictively and granted Bartram's motion to dismiss. The State appeals the subsequent order dismissing its second set of charges against Bartram.

ANALYSIS

¶7 We first address the standard we are to apply in reviewing the trial court's determination that the prosecutor had engaged in "actual vindictiveness."[3] The State contends that the trial court's determination is a legal conclusion and is therefore subject to our de novo review. Bartram, however, argues that the court's determination is actually a factual finding which should not be set aside unless it is clearly erroneous.

¶8 This issue was recently resolved by the supreme court in ***State v. Johnson***, 2000 WI 12, 232 Wis. 2d 679, 605 N.W.2d 846. There, the court determined that "whether the defendant established actual vindictiveness" is a finding of fact and is reviewed under the clearly erroneous standard. ***Id.*** at ¶18. Accordingly, we will only reverse the trial court's determination that the prosecutor's actions were vindictive if we conclude that this determination is clearly erroneous, that is, that it is contrary to the great weight and clear preponderance of the evidence. *See* ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983) (explaining that the "clearly erroneous" test and the "great weight and clear preponderance" test are "essentially the same"). Mindful of this standard, we turn to the merits of the State's appeal.

¶9 The State contends that the trial court erred in dismissing the new charges that were brought against Bartram on February 26, 1999. Specifically, the State argues that the court incorrectly determined that the prosecutor acted

[3] In the motion he submitted to the trial court, Bartram contended that the prosecutor's actions were both "presumptively and actually vindictive." The trial court, however, found only actual vindictiveness. Bartram does not reassert his claim of presumptive vindictiveness in his brief to this court, and we therefore do not consider whether the prosecutor's actions raised a presumption of vindictiveness.

vindictively when he brought these additional charges. The trial court apparently concluded that the State could not have proven the elements of the original possession with intent to deliver charge, and that the prosecutor threatened to bring additional charges in order to "bully" Bartram into pleading guilty to this charge. The State, however, insists that the prosecutor had a "good faith belief" that he could obtain a conviction on the original possession with intent charge, and that this belief remained intact until the morning of the scheduled trial when the court stated that it would not allow the State to introduce certain evidence at trial.[4] The State also contends that it was not improper for the prosecutor to threaten to file additional charges against Bartram.

¶10 A prosecutor presumably brings criminal charges against a defendant for the purpose of securing a conviction, and we recognize that the plea

[4] The original possession with intent to deliver charge stated that "on or about the 23rd day of March, 1998 … the defendant, Peter Jay Bartram, did … possess with intent to deliver less than 3 grams of methamphetamine," but prior to trial the "or about" language was removed from the charge. In order to prove this charge, the State had to establish intent to deliver. Under WIS. STAT. § 961.41(1m), "[i]ntent … may be demonstrated by … evidence of the quantity and monetary value of the substances possessed, the possession of manufacturing implements or paraphernalia, and the activities or statements of the person in possession of the controlled substance…."

When the trial court decided not to allow the prosecutor to introduce evidence of manufacturing in order to prove this charge, the court explained that it did not believe that the evidence was relevant to prove that Bartram possessed methamphetamine with intent to deliver on the date specified in the charge. The court subsequently concluded that "[t]he evidence available to the prosecutor was clearly insufficient to support a conviction on the charge of possession of methamphetamine with intent to deliver…."

In its new criminal complaint, the State modified the language of the original charge and stated that "*on or between January 1, 1998, and March 22, 1998* … the defendant Peter Jay Bartram … did … possess with intent to deliver more than *10 grams* … of methamphetamine…." (Emphasis added.) The State apparently modified the language of this new charge to take into account the statement made by Bartram on March 23, 1998, in which he admitted that he had been "manufacturing methamphetamine in the amount of approximately ¼ ounce per week … for the past two or three months."

negotiation process is one of the means through which a prosecutor may acquire such a conviction. We also note that a prosecutor has wide discretion in deciding whether to file criminal charges, and that the prosecutor's initial charging decision is often influenced by his or her desire to induce a guilty plea from the defendant. *See* ***Bordenkircher v. Hayes***, 434 U.S. 357, 364-65 (1978). The Supreme Court recognized in ***Bordenkircher*** that plea negotiation is a legitimate process and held that a prosecutor can constitutionally threaten to file additional charges against a defendant if the defendant refuses to plead to the charges before him or her. *See* ***id.*** at 363-65. The Court explained that "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor's] discretion." ***Id.*** at 364.

¶11 A prosecutor, however, cannot retaliate against a defendant for exercising his or her constitutional rights. *See* ***id.*** at 363. Although the prosecutor may lawfully attempt to deter a defendant from exercising his or her right to trial, the prosecutor cannot penalize a defendant for rejecting a plea offer and proceeding to trial. *See* ***United States v. Goodwin***, 457 U.S. 368, 372 (1982). In Bartram's case, the trial court determined that the prosecutor filed the new charges "solely for the purpose of punishing [Bartram] for exercising his right to a jury trial…." The trial court was apparently influenced by the fact that Bartram had possessed only "one one-thousandth of a gram" of methamphetamine on the date of his arrest, and by the fact that the prosecutor first threatened to file additional charges against Bartram one week prior to trial. The trial court therefore determined that "[t]he evidence available to the prosecutor was clearly insufficient to support a conviction of possession of methamphetamine with intent to deliver," and that the prosecutor threatened to file additional charges against Bartram in an

attempt to persuade him to plead guilty to a charge that the prosecutor "obviously didn't have a case" on.

¶12 We conclude, however, that the record before the trial court was insufficient to support this determination. At the time of the hearing on Bartram's motion to dismiss the new charges, the only items before the trial court to support Bartram's allegation of prosecutorial vindictiveness were Bartram's "Motion to Dismiss," which incorporated an affidavit that summarized the contents of the record and set forth the sequence of events that preceded the motion, and his "Brief in Support of Motion to Dismiss." The record did not contain any documentary or testimonial evidence that specifically addressed Bartram's allegation. At the beginning of the hearing, the court asked the parties if it could "assume that the allegations of paragraphs 2 through 8 of the affidavit … accurately state the historical record of the case[.]" The State initially objected to this request and explained that it disagreed with some of the "characterizations" contained in the affidavit. The trial court, however, stated that it was asking only that the parties stipulate to the sequence of events leading up to the hearing and not to the affidavit's characterizations of these events. The court then adopted the facts set forth in the affidavit.

¶13 This stipulated sequence of events constitutes the only factual finding that the trial court made before it determined that the prosecutor's actions were vindictive. The trial court apparently believed that it had satisfied its fact-finding duties when it "assume[d] that these [were] the facts." We conclude, however, that the stipulated facts regarding the order of events in this case are not a sufficient basis on which to rest a finding that the prosecutor had acted with actual vindictiveness when he filed the new charges against Bartram. Given the prosecutor's assertion of a "good faith belief" that he could prove the original two

charges at trial, at a minimum, the court should have taken testimony on the matter and considered the weight and credibility of that testimony. If the trial court had conducted an evidentiary hearing, the prosecutor would have had the opportunity to explain under oath why he felt that he had a good-faith basis for bringing the original charges against Bartram, and Bartram would have had the chance to cross-examine the prosecutor on this point. Similarly, Bartram would have been able to ask the prosecutor about the February 17th letter and his motive in filing the additional charges against Bartram, and the prosecutor would have had the chance to respond to these questions and to explain his plea-bargaining strategy.

¶14 To find actual vindictiveness, a court must determine that there is "'objective evidence that a prosecutor acted in order to punish the defendant for standing on his legal rights.'" *See* ***State v. Johnson***, 2000 WI 12 at ¶47 (citation omitted). Because the record contains no evidence beyond the stipulated sequence of events leading up to the filing of the new charges, which we deem insufficient to establish actual vindictiveness, we conclude that the trial court's finding of actual vindictiveness was clearly erroneous. We thus reverse the dismissal order and remand the case to the trial court for an evidentiary hearing on whether the prosecutor acted with actual vindictiveness in filing the new charges against Bartram.[5]

[5] We acknowledge that, in the absence of a "presumption of vindictiveness," it is the defendant's burden to establish that a prosecutor acted with actual vindictiveness in adding new charges. *See* ***State v. Johnson***, 2000 WI 12, ¶47, 232 Wis. 2d 679, 605 N.W.2d 846. Given that the court invited the parties to stipulate to the facts in Bartram's affidavit, and then based its decision to dismiss on only these facts, we do not feel it appropriate to attribute to Bartram the insufficiency of the evidence in the record to support the court's finding of actual vindictiveness. Neither party requested the court to allow testimony on the issue, and on remand, each will be given that opportunity.

CONCLUSION

¶15 For the reasons discussed above, we reverse the order of the trial court and remand for further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.