COURT OF APPEALS
DECISION
DATED AND FILED

April 2, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2856-CR **Cir. Ct. No. 02-CT-432**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT A. ALLEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: MICHAEL O. BOHREN, Judge. *Affirmed*.

¶1 NETTESHEIM, P.J.[1] Robert A. Allen appeals from a forfeiture judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration (PAC) as a fourth offense. Allen argues that the State violated his

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version.

constitutional right to a speedy trial. The trial court rejected this motion despite finding that Allen had been prejudiced by the delay and that the State had not offered an adequate explanation for the nearly one-year interval between the date of the offense and the date of the charging. We conclude that by entering a guilty plea, Allen has waived the right to argue that he was denied his constitutional right to a speedy trial. *See* ***Hatcher v. State***, 83 Wis. 2d 559, 563, 266 N.W.2d 320 (1978). On that basis, we affirm the judgment.

¶2 On March 11, 2002, the State filed a criminal complaint against Allen alleging that he operated a motor vehicle with a prohibited alcohol concentration. The incident resulting in the charge occurred over eleven months earlier, on April 15, 2001. On April 22, 2002, Allen filed a motion to dismiss based on a denial of his right to a speedy trial. The trial court denied Allen's motion following a hearing on June 3, 2002. However, at Allen's request, the trial court reconsidered its decision at a hearing on June 27, 2002. Following arguments, the trial court vacated its order denying Allen's motions. In reaching its new decision, the trial court noted that a twelve-month period of delay is presumptively prejudicial. It found that eleven and one-half months had passed between Allen's arrest and initial appearance and therefore declined to find that Allen had been presumptively prejudiced. Next, the court found that the State provided no explanation for the delay.

¶3 As to prejudice, the trial court found that Allen was prejudiced by the anxiety relating to the pending charges and by the conditions of bond. The court also found that Allen was prejudiced by his inability to request a retest of his blood sample because the State Hygiene Lab destroys all blood samples after six months. However, the court nonetheless denied Allen's motion finding that the prejudice did not rise to the level of the extraordinary circumstances standard set

forth in ***State v. Lemay***, 155 Wis. 2d 202, 204, 455 N.W.2d 233 (1990). Allen subsequently entered a guilty plea to the PAC charge.

¶4 Allen appeals the judgment based on the trial court's denial of his motion to dismiss which is based on Allen's claim that he was denied a speedy trial. However, the general rule is that a guilty or no contest plea waives all nonjurisdictional defects and defenses, including alleged constitutional violations occurring prior to the plea. ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53, *review denied*, 2002 WI 111, 256 Wis. 2d 65, 650 N.W.2d 841 (July 26, 2002) (No. 01-2503-CR). This includes the right to a speedy trial. *See* ***Hatcher***, 83 Wis. 2d at 563.

¶5 We appreciate that the State has not argued waiver as a defense to Allen's appeal. Thus, under ordinary circumstances, we might well not invoke waiver. ***State v. Riekkoff***, 112 Wis. 2d 119, 123-24, 332 N.W.2d 744 (1983) (the guilty-plea-waiver rule is a rule of administration and not of power and does not deprive an appellate court of its subject matter jurisdiction). However, Allen's plea, and the resultant lack of a trial in this case, make it difficult for us to assess any prejudice resulting from the delay in prosecution.

¶6 The question of prejudice is critical to a determination of whether a defendant's constitutional rights have been violated. *See* ***State v. Leighton***, 2000 WI App 156, ¶¶ 22-23, 237 Wis. 2d 709, 616 N.W.2d 126. The prejudice factor is assessed in light of three of the defendant's interests which the speedy trial right is designed to protect: (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 ¶22. However,

> [t]he United States Supreme Court has recognized that impairment to the defense is the "most serious [of the defendant's interests] ... because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." ***Barker*** [***v. Wingo***], 407 U.S. [514,] 532 [(1972)]. The defense may be impaired (1) if witnesses die or disappear during a delay; (2) if defense witnesses are unable to recall accurately events of the distant past; or (3) if a defendant is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense.

Leighton, 2000 WI App 156 at ¶23 (citation omitted).

¶7 In ***Lemay***, the supreme court held that it could not conduct a meaningful prejudice determination in an interlocutory appeal setting based only on a pretrial record. ***Lemay***, 155 Wis. 2d at 214-15. The court said:

> Based on the pretrial record, the defendant asks this court to weigh the ***Barker*** factors and determine on the merits whether he has been deprived of his right to a speedy trial. This cannot be done. The evidence available in this case poses no extraordinary circumstances prior to a trial on the merits upon which we can conclude that Lemay has been substantially prejudiced by the delay. In the absence of a showing of extraordinary circumstances, an outright dismissal of the information with prejudice on speedy trial grounds is not warranted because the evidence of prejudice is speculative until after trial….
>
> Whether the state's witnesses' memories or lack thereof are prejudicial to the defendant's ability to present his defense can only be seen with finality at trial.

Lemay, 155 Wis. 2d at 214-15.

¶8 The United States Supreme Court echoed the same concern in ***United States v. MacDonald***, 435 U.S. 850, 858-59 (1978), where the Court held that it could not render a final disposition of a speedy trial motion in an interlocutory appeal setting. The Court reasoned that the merits of a speedy trial claim were inextricably intertwined with the merits of the case-in-chief and

therefore a pretrial determination of prejudice to the defendant would be speculative and premature. ***Id***.

¶9 While the instant case is not in the posture of an interlocutory appeal, we are nonetheless faced with the same dilemma as the appellate courts in ***Lemay*** and ***MacDonald***. We are asked to make a prejudice determination in a speedy trial setting without the benefit of a full trial on the merits of the State's case-in-chief. Although Allen was unable to obtain a retest of his blood sample, it nonetheless remains that effective cross-examination by Allen may have seriously discredited this evidence.[2] Or, at a minimum, Allen might have demonstrated a need for retesting of the sample. But Allen's guilty plea shut down this process. Allen will not be heard to claim speedy trial prejudice when his own conduct has foreclosed a full probe of that factor. In summary, the lack of a trial makes it difficult, if not impossible, for us to conduct a meaningful evaluation of Allen's claim of prejudice. As a result, we are compelled to abide by the guilty-plea-waiver rule. We affirm the judgment.

By the Court.—Judgment affirmed.

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

[2] We decline to hold as a matter of law that Allen's inability to obtain a retest of his blood sample constitutes the "extraordinary circumstances" contemplated by ***State v. Lemay***, 155 Wis. 2d 202, 215, 455 N.W.2d 233 (1990).