

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 1, 2005

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2003AP2063-CR

Cir. Ct. No. 1998CF317

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NICKIE C. BREWINGTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: DALE L. ENGLISH, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Nickie C. Brewington has appealed from a judgment convicting him of escape in violation of WIS. STAT. § 946.42(3)(a)

(1999-2000).¹ The sole issue on appeal is whether Brewington was denied his constitutional right to a speedy trial. Because we conclude that Brewington's speedy trial right was not violated, we affirm the judgment.

¶2 Whether a defendant has been denied his or her right to a speedy trial is a constitutional question which this court reviews de novo. *State v. Leighton*, 2000 WI App 156, ¶5, 237 Wis. 2d 709, 616 N.W.2d 126. However, the trial court's findings as to the underlying historical facts will not be disturbed unless they are clearly erroneous. *Id.*

¶3 Courts employ a four-part balancing test when analyzing whether a defendant's constitutional speedy trial right has been violated. *State v. Borhegyi*, 222 Wis. 2d 506, 509, 588 N.W.2d 89 (Ct. App. 1998). The court must consider: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted the right to a speedy trial; and (4) whether the delay resulted in prejudice to the defendant. *Leighton*, 237 Wis. 2d 709, ¶6.

¶4 “The right to a speedy trial, however, is not subject to bright-line determinations and must be considered based upon the totality of circumstances that exist in any specific case.” *Borhegyi*, 222 Wis. 2d at 509. In evaluating a speedy trial claim, the court must review each of the four factors and conclude its analysis by weighing the totality of the circumstances presented by the case. *Id.* at 510.

¹ The version of the Wisconsin Statutes that applies to Brewington's conviction is the 1999-2000 version. All other references to the Wisconsin Statutes are to the 2003-04 version.

¶5 The facts material to Brewington's speedy trial claim are undisputed for purposes of appeal. On October 22, 1998, a criminal complaint was filed charging Brewington with escaping from custody based upon his failure to return to the county jail while on work release on October 16, 1998. According to the complaint, Brewington was apprehended in Illinois on October 17, 1998. He was then taken to Kenosha county for the prosecution of an armed robbery committed on October 16, 1998, during his period of escape. The Kenosha county charge was subsequently amended, and Brewington pled guilty to robbery. On July 30, 1999, he was sentenced to five years in prison for that offense.

¶6 In a letter to the Fond du Lac county clerk of circuit court that was filed on June 21, 2000, Brewington advised the clerk that he was invoking his speedy trial right. In July 2000 he moved to dismiss the escape charge based upon a violation of his speedy trial right. The trial court denied the motion after a hearing, and Brewington entered a no contest plea. On November 14, 2000, the trial court sentenced him to forty-two months in prison, consecutive to the five-year sentence for the robbery charge.

¶7 Subsequently, Brewington withdrew his plea of no contest to the escape charge. He then renewed his motion to dismiss based upon the speedy trial issue. The trial court denied the motion and convicted Brewington of escape in a trial to the court. Prior to sentencing, Brewington again renewed his motion to dismiss.

¶8 At the February 14, 2003 hearing on the third speedy trial motion, the trial court found that the length of the delay was presumptively prejudicial. It also found that the delay was attributable to the State, although it was not intentionally designed to disadvantage the defense and did not evince a cavalier

disregard of Brewington's rights. In addition, it found that Brewington demanded trial as soon as he became aware that he had a right to a speedy trial. However, it denied the motion to dismiss based upon its determination that the delay did not prejudice Brewington. It then sentenced Brewington to forty-two months in prison, consecutive to the five-year sentence imposed for the Kenosha county robbery.

¶9 On appeal, neither party disputes the trial court's findings as to the first three factors. However, Brewington contends that the trial court failed to properly assess whether the delay resulted in prejudice to him. He contends that the trial court failed to consider the possibility that, if he had been tried and sentenced earlier, his escape sentence might have been made concurrent to the five-year sentence for robbery imposed in Kenosha county in 1999, thus reducing his total prison time.² He argues that the trial court's analysis of the speedy trial issue was therefore incomplete. He requests that the judgment of conviction be reversed, or, alternatively, that the matter be remanded to the trial court to address this issue.

¶10 The prejudice factor must be assessed in light of the interests of the defendant which the speedy trial right was designed to protect. *Leighton*, 237 Wis. 2d 709, ¶22. The court must consider the following interests: (1) preventing oppressive pretrial incarceration; (2) minimizing the defendant's anxiety and concern; and (3) limiting the possibility that the defense will be impaired. *Id.* In

² Brewington acknowledges that a sentence for escape must be made consecutive to the sentence the defendant was serving when he or she escaped. *See* WIS. STAT. § 946.42(4)(a). When Brewington walked away from the jail, he was serving a six-month sentence imposed after revocation of probation in a misdemeanor case.

addition, the courts have recognized a fourth type of prejudice; namely, that when the defendant is detained on another charge, the failure to bring the pending charge to trial eliminates the possibility that concurrent sentences can be imposed. *Green v. State*, 75 Wis. 2d 631, 638, 250 N.W.2d 305 (1977).

¶11 The impairment of the defense is the most serious of the four types of prejudice set forth above because the inability of a defendant to prepare his or her case skews the fairness of the entire system. *Leighton*, 237 Wis. 2d 709, ¶23. However, at the February 14, 2003 hearing, Brewington's counsel conceded that Brewington was not claiming that his defense had been impaired by the delay. Brewington also conceded that he was in custody for other offenses during the period of delay in this case. The delay therefore did not prolong his pretrial incarceration.

¶12 Based upon these factors, and because no challenge is made to the trial court's finding that the delay did not evince a cavalier disregard of Brewington's rights, the minimal prejudice from the increased anxiety suffered by Brewington, standing alone, is insufficient to justify relief. *See Green*, 75 Wis. 2d at 638. In addition, we reject Brewington's contention that he suffered prejudice by losing the possibility of a concurrent sentence. Based upon the record, there existed no likelihood that the trial court would have imposed a concurrent sentence if Brewington had been brought to trial sooner.

¶13 Brewington is correct when he states that the trial court never addressed the possibility of a concurrent sentence when resolving his speedy trial motion. However, immediately after denying the motion on February 14, 2003, the trial court sentenced Brewington. In determining that forty-two months was the appropriate length of sentence, it considered the seriousness of Brewington's

course of conduct, noting that he left custody when he was supposed to be looking for work, drank alcohol, took a car from a car dealership, robbed a bank after telling a bank employee that he had a gun, bought a gun, and ended up in Illinois. It considered and rejected imposing a concurrent sentence, ordering that the forty-two month sentence be served consecutively to the robbery sentence.

¶14 In sentencing Brewington on February 14, 2003, the trial court imposed the same consecutive forty-two month sentence that it had imposed after Brewington's first sentencing for this escape in 2000. When it originally sentenced Brewington on November 14, 2000, the trial court also ordered that the sentence be consecutive. As in 2003, it concluded that this offense was serious. It noted that Brewington had been given the privilege of Huber release while in custody and had violated that privilege. It concluded that the offense was made more severe by the fact that he drank alcohol while he was out, stole a car, and committed an armed robbery.

¶15 Because the trial court imposed a consecutive sentence when it first sentenced Brewington in 2000, we reject Brewington's claim that he would be finished serving his escape sentence if the case had not been delayed. Moreover, as these events clearly demonstrate, Brewington's escape sentence was consecutive because the trial court determined that a consecutive sentence was warranted based on the facts surrounding the crime. There is no likelihood that the sentence would have been concurrent were it not for the State's delay in pursuing the escape charge. Under the totality of the circumstances, Brewington therefore was not deprived of his constitutional right to a speedy trial. *See id.*

By the Court.—Judgment affirmed.

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

