COURT OF APPEALS
DECISION
DATED AND FILED

August 25, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2003AP3532-CR **Cir. Ct. No. 2002CT445**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DENNIS P. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed.*

¶1 DEININGER, J.[1] Dennis Smith appeals a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant (OMVWI),

[1] This appeal is decided by one judge pursuant to WIS. STAT.§ 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

as a third offense. He also appeals an order denying his motion for postconviction relief. Smith claims that his Sixth Amendment rights to counsel and to a speedy trial were violated during the circuit court proceedings. We disagree and affirm.

BACKGROUND

¶2 The offense in question took place on December 1, 2001. A police officer for the Village of Sauk City arrested Smith for OMVWI and apparently issued him a municipal citation for a first offense.[2] On October 21, 2002, the State filed a criminal complaint charging Smith with third-offense OMVWI, citing prior convictions dating from 1990 and 2001. Smith was summoned to make an initial appearance on the criminal charge before a court commissioner, who informed Smith of his right to an attorney and that the public defender may appoint an attorney for him if he could not afford to hire one. Smith informed the court that he did not have an attorney and did not wish to speak with one before entering a plea. He then stood mute; a not guilty plea was entered on his behalf and he was released pending future court appearances on a signature bond.

¶3 At a subsequent status conference, the circuit court advised Smith of his right to counsel and that he could apply to the public defender for

[2] Neither the citation issued on the date of the offense nor any record of the forfeiture action that ensued are contained in the record before us. Smith asserted in his postconviction motion that the offense "was originally erroneously charged as an OWI, first offense … on 12-10-2001." During argument on the motion, Smith's counsel asserted that there was "a delay of 11 months from when this was initially charged as a municipal violation and from when it was retried as a criminal charge against him." In making its ruling on the motion, the circuit court noted that the offense had originally been charged as "an ordinance violation," but the court did not "know the date it was dismissed." The Wisconsin Circuit Court Access online data base shows that citations for first-offense OMVWI and operating with a prohibited alcohol concentration were filed in Sauk County Circuit Court on December 10, 2001, case numbers 2001TR008314 and 008315, captioned Village of Sauk City v. Dennis P. Smith. Both forfeiture actions were dismissed June 20, 2002, on motion of the village attorney.

representation "or file an indigency application with Sauk County." The court continued the case for a week and advised Smith to "go to the Public Defender's office today. Make sure you talk to a lawyer. This is a serious offense."

¶4 A week later, Smith informed the court that he did not qualify for representation through the public defender's office and presented his affidavit of indigency in support of his obtaining counsel at county expense. The court found Smith had "roughly $1300 a month as a net income, that's a good $400 or so over the federal monthly poverty guideline for a family of two." The court also concluded that Smith had no other "extraordinary … binding legal obligations" and determined him ineligible for counsel at county expense. The court again advised Smith to promptly make arrangements for counsel "because you've been advised of your right on that several times and you won't be … able to come to the final pretrial and say you still don't have a lawyer and have it continued. It won't be."

¶5 At his next court appearance on December 11, 2002, Smith informed the court that he had selected an attorney and was "assembling" the requested one thousand dollar retainer fee. The court directed that the case be placed "on the trial calendar," telling Smith that a month or two would pass before trial, which "should give you the time you need to obtain counsel; but once it's on the calendar, it's not going to be taken off because you've had time to make arrangements." On December 16th, the court notified Smith and the State that the case would be tried to a jury on January 31, 2003.

¶6 The day before the scheduled trial, the court conducted a hearing on motions filed by both parties. Before taking up the motions, the court inquired of Smith whether he wanted to be represented by counsel. Smith replied that he had

"not been able to secure an attorney's services." The court then conducted a colloquy with Smith regarding his efforts to obtain counsel and the advantages of being represented at trial and other court proceedings. The court then asked Smith whether, "knowing all of that, are you now prepared to proceed on your own behalf," to which Smith replied, "Yes, I am, your Honor." The court accepted Smith's waiver of counsel as "free, knowing and voluntary," and it then ruled on the parties' motions. After disposing of the motions, the court cautioned Smith that, even though he was unrepresented at trial, he would be subject to the rules of evidence and that a defense challenge to the accuracy or reliability of the breath-testing device might well require the testimony of an expert.

¶7 The trial did not take place on January 31, 2003, but the record provides no explanation of why it was continued. A scheduling notice sent to the parties on February 4th informs them that the trial was scheduled for April 24, 2003. At a final pretrial conference on April 23rd, the court again queried Smith regarding his knowledge of his right to representation and its advantages. Smith replied that he had been denied appointed counsel by both the public defender and the court and that he was "painfully aware" of the assistance an attorney could render him. He acknowledged his understanding of his right to counsel and stated his belief that he was competent to represent himself. The court again found Smith's waiver of counsel to be "free, knowing and voluntary."

¶8 Smith represented himself at trial and the jury found him guilty of OMVWI. Sentencing was scheduled for May 19, 2003, but was continued at Smith's request in order to give him the opportunity to obtain an attorney to represent him at sentencing. The public defender apparently again found him ineligible and he renewed his request for an appointment at county expense based on a change in his financial circumstances. The court again declined to appoint

counsel, concluding that Smith's income significantly exceeded federal poverty guidelines. Smith then retained counsel, and at counsel's request, the sentencing was first set over from June 19th to July 31st, and ultimately to September 2, 2003. Smith appeared on the latter date with counsel and the court imposed sentence.

¶9 Smith's counsel filed a notice of intent to pursue postconviction relief and successfully moved for a stay of his sentence. Smith then commenced this appeal but requested and obtained an order remanding the case so that Smith could move the circuit court for postconviction relief. In his postconviction motion, Smith requested a new trial on the grounds that he was denied his Sixth Amendment rights to counsel and to a speedy trial, as well as being denied due process. The circuit court denied relief and the matter returned to this court with Smith now challenging both his conviction and the order denying postconviction relief.

ANALYSIS

¶10 Smith asserts that his Sixth Amendment rights to counsel and to a speedy trial were violated during proceedings in the trial court. Smith also claims the trial court violated his right to due process by denying him a theory of defense. Smith's due process claim does not allege a separate error by the trial court, however. Instead, it rests squarely on his Sixth Amendment right-to-counsel claim. Essentially, Smith's contention is that, because he was pro se at trial, he was unable to marshal the proper arguments and evidence to present his defenses of residual mouth alcohol and radio frequency interference with the breath-testing device.

¶11 Article I, section 7 of the Wisconsin Constitution and the Sixth Amendment to the United States Constitution guarantee both the right to counsel and the right to represent oneself at trial. ***State v. Polak***, 2002 WI App 120, ¶¶8-9, 254 Wis. 2d 585, 646 N.W.2d 845. These concomitant and potentially conflicting rights require that a trial court ensure that a defendant who wishes to proceed without counsel does so knowingly, intelligently and voluntarily, and further, the court must be satisfied that the defendant is competent to represent him- or herself at trial. *See* ***id***., ¶10. Smith does not claim that he was not competent to represent himself. Thus, the only question we must decide is whether the record establishes that Smith knowingly, intelligently and voluntarily waived his right to counsel. This is a question of constitutional law that we decide de novo. ***Id***., ¶11. We conclude the record establishes a proper waiver of counsel.

¶12 Because a criminal defendant's right to counsel is an important one, the law presumes nonwaiver of the right. ***Id***. To overcome the presumption, the State must demonstrate that the record affirmatively shows a knowing, intelligent and voluntary waiver of counsel. ***Id***. The State meets its burden if the record establishes that the trial court conducted a colloquy with the defendant in which the defendant: (1) made a deliberate choice to proceed without counsel; (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charges against him or her, and (4) was aware of the general range of penalties that could have been imposed upon him or her. ***Id***., ¶14 (citing ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997)). The present record shows that the trial court complied with the ***Klessig*** requirements, not once but twice.

¶13 Smith was advised at his initial appearance of the charges and penalties he faced if convicted. At that appearance and a later one, he was advised

of his right to counsel. After Smith communicated a desire to represent himself, the trial court on two occasions prior to trial engaged in lengthy colloquies with him to ensure that he was knowingly, intelligently and voluntarily choosing to waive his right to an attorney. On each occasion, the trial court ascertained that Smith was making a deliberate choice to proceed without counsel, that he was aware of the difficulties of proceeding without counsel, and that Smith was aware of the seriousness of the charges against him. The trial court also pointed out to Smith at a pretrial hearing that he would be bound by the same rules of evidence at trial as would an attorney. The record provides no indication that Smith did not understand the right to counsel, the disadvantages of self-representation or the seriousness of the charges and penalties he faced.

¶14 Smith claims that his waiver of the right to counsel was not voluntary because he could not afford to pay the retainer fee for an attorney. Smith did not challenge the public defender's determination that he was ineligible for representation by that office, and he does not claim on appeal that the trial court erred in concluding that his income, being well above federal poverty guidelines, rendered him ineligible for court-appointed counsel. We conclude that the record shows that Smith was given ample opportunity to procure representation but chose not to do so. We agree with the trial court's assessment that the record demonstrates that Smith was able to afford the services of an attorney and had sufficient time to accumulate or arrange for a retainer. The present record establishes that Smith's decision to proceed pro se was a voluntary decision on his part, based on his personal financial priorities.

¶15 We thus reject Smith's claim that the trial court violated his Sixth Amendment right to counsel. This conclusion also defeats his claim that he was denied a fair opportunity to advance certain defenses that he asserts an attorney

would have been better able to present. Because his waiver of counsel was knowing, intelligent and voluntary, and he raises no question regarding his basic competence to represent himself, he cannot claim a constitutional violation from the fact that an attorney may well have mounted a better defense or defenses at trial than he was able to accomplish pro se. The reality that most defendants will be better represented by counsel than themselves is one of the reasons that ***Klessig*** requires trial courts to ensure that defendants understand the difficulties and disadvantages of self-representation before accepting waivers of counsel. As we have discussed, the trial court in this case satisfied this requirement.

¶16 Smith's second claim of error is that he was denied his Sixth Amendment right to a speedy trial. The United States Supreme Court has determined that, because this right is "a more vague concept… [making it] impossible to determine with precision when the right has been denied," inquiries into speedy trial claims necessitate a functional analysis of the right in the particular context of a given case. ***Barker v. Wingo***, 407 U.S. 514, 521-22 (1972). The Court thus developed a balancing test designed to weigh the conduct of both the State and the defendant in producing trial delays. ***Id***. at 530. The Wisconsin Supreme Court has adopted the ***Barker*** test. *See* ***Day v. State***, 61 Wis. 2d 236, 242-47, 212 N.W.2d 489 (1973).

¶17 Determining whether a defendant's right to a speedy trial has been violated involves the consideration of four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) the prejudice to the defendant. ***Hatcher v. State***, 83 Wis. 2d 559, 566, 266 N.W.2d 320 (1978) (citing ***Barker***, 407 U.S. at 530). The first factor also operates as a threshold inquiry, however. Only if the delay is of sufficient length to be deemed presumptively prejudicial will the analysis of the remaining three factors become

necessary. ***Id***. at 566-67. "Generally, a post-accusation delay approaching one year is considered to be presumptively prejudicial." ***State v. Urdahl***, No. 2004AP3014-CR, ¶12 (WI App July 14, 2005) (recommended for publication).[3]

¶18 In determining the length of delay in his criminal prosecution for OMVWI, Smith would have us count the entire length of time between the issuance of the municipal citation for OMVWI on December 1, 2001, and his trial on April 24, 2003, a period of some seventeen months. We decline to do so. We concluded in ***Urdahl***, ¶20, that the time period between the dismissal of prior charges relating to a given offense and the re-filing of new charges "is not included in determining whether [the] constitutional right to a speedy trial was violated." Thus, the period from the dismissal of the forfeiture action (June 20, 2002, see n.2) and the filing of the criminal complaint (October 21, 2002) need not be counted, thereby reducing the relevant delay to, at most, thirteen months.

¶19 We did not decide in ***Urdahl*** whether the duration of an initial, dismissed criminal prosecution should be counted for constitutional speedy trial purposes as part of the pre-trial delay in a second prosecution for the same offense. *See* ***id***. at ¶21-24. Here, however, the prior proceeding was a civil forfeiture action for a municipal ordinance violation, not a criminal prosecution.

¶20 The Sixth Amendment guarantee of a speedy trial applies only to criminal prosecutions. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."). Moreover, as we

[3] In the event ***State v. Urdahl***, No. 2004AP3014-CR (WI App July 14, 2005), is not ordered published following the publication conference on August 31, 2005, we adopt by reference the rationale and authorities appearing in the cited paragraphs of that opinion.

noted in ***Urdahl***, ¶18, the primary concern addressed by the Sixth Amendment is not pretrial delay per se or the prejudice to the defense that may result from it. Rather, the Sixth Amendment "is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." ***Id***. (quoting ***U.S. v. MacDonald***, 456 U.S. 1, 7-8 (1982)). Civil forfeiture actions do not involve pretrial incarceration, liberty-restricting pretrial conditions of release or "unresolved criminal charges." ***Id.*** Accordingly, we see no reason why the period of time from the issuance of the OMVWI ticket in December 2001 through its dismissal in June 2002 should be deemed pretrial delay with respect to the criminal prosecution that was first commenced in late October of 2002.

¶21 In short, the total constitutionally relevant pretrial "delay" in Smith's case spanned just over six months—from October 21, 2002, through April 24, 2003. He would have been sentenced on the conviction within a month after trial (May 19) but for his renewed, ultimately successful, effort to retain counsel and counsel's subsequent requests for continuances of the sentencing. Even with these posttrial delays, all attributable to Smith, the court sentenced him and entered a judgment of conviction on September 3, 2003, well under a year from the date the complaint was filed. We therefore conclude that Smith's speedy trial claim founders on the first, threshold inquiry. Because the delay in bringing Smith to trial on the criminal charges was barely six months, and because his sentence was imposed and judgment entered in well under a year, Smith suffered no presumptively prejudicial delay in resolving the criminal charges filed against

him. Our conclusion renders unnecessary any consideration of the remaining ***Barker*** factors.[4]

CONCLUSION

¶22 For the reasons discussed above, we affirm the appealed judgment and order.

By the Court.—Judgment and order affirmed.

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

[4] As we noted in ***Urdahl***, ¶¶17-18, even though the lapse of time between Smith's commission of the offense and the State's filing of criminal charges, a period of some eleven months, is not relevant to the Sixth Amendment speedy trial inquiry, "pre-charging" delay may give rise to a Fifth Amendment due process claim. Smith makes no such claim, however, and we thus have no cause to discuss it further.