COURT OF APPEALS
DECISION
DATED AND FILED

September 27, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP778-CR **Cir. Ct. No. 2003CM248**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD A. HOEFT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and of the circuit court for Rusk County: JAMES C. BABLER, Judge. *Affirmed.*

¶1 PETERSON, J.[1] Richard Hoeft appeals a conviction for theft of movable property, contrary to WIS. STAT. § 943.20(1)(a), as a party to the crime and as a repeater, contrary to §§ 939.05 and 939.62(1)(a). Hoeft contends that the

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

circuit court erred by denying his motion to dismiss, which asserted that he was denied his Sixth Amendment right to a speedy trial. We affirm.

BACKGROUND

¶2 On September 22, 2003, a summons and criminal complaint were issued against Hoeft, alleging that he, with a companion, stole a logging clam from an unattended logging machine in Rusk County. On December 2, Hoeft made his initial appearance. On December 4, Hoeft requested a substitution of judge, which was granted on December 15. The case was assigned to Judge Babler of Barron County, who signed a writ of habeas corpus to bring Hoeft to a plea hearing/status conference scheduled for February 19, 2004. However, the February 19 hearing never occurred.

¶3 The writ to produce Hoeft on February 19 could not be executed because Hoeft was no longer at the state prison. The record is somewhat unclear on the following facts. Supposedly, Hoeft had been taken into federal custody. The State contends that Hoeft was in federal custody for seventy-five days. The State presented no evidence, nor did it argue, that it ever attempted to obtain Hoeft from federal custody.

¶4 In August 2004, Hoeft wrote a letter to his attorney, firing him. A copy of this letter was filed with the court on August 25. Hoeft, acting pro se, then began making discovery requests. On October 18, Hoeft filed a motion to dismiss, arguing violation of his right to a speedy trial. On October 28, Hoeft was brought to court for a hearing on his motion. After denying Hoeft's motion to dismiss, the court scheduled Hoeft's trial for November 5, 2004, which was the following Friday. On November 5, a jury found Hoeft guilty as party to the crime of theft. Hoeft appeals.

DISCUSSION

¶5 The Sixth Amendment to the United States Constitution provides that "in all criminal proceedings, the accused shall enjoy the right to a speedy and public trial …." In reviewing constitutional questions, we review a circuit court's findings of historical fact under the clearly erroneous standard, but review application of the law to those facts without deference. ***State v. Borhegyi***, 222 Wis. 2d 506, 508-09, 588 N.W.2d 89 (Ct. App. 1998).

¶6 The United States Supreme Court outlined the analytical process by which courts are to decide speedy trial claims in ***Barker v. Wingo***, 407 U.S. 514 (1972). The Court adopted a balancing test, identifying the following four factors to be weighed: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of right; and (4) prejudice to the defendant. ***Id.*** at 530.

¶7 The first factor, length of delay, functions as a triggering mechanism; unless there is some delay that is presumptively prejudicial, a court need not weigh the other factors. ***Id.*** Whether a delay is presumptively prejudicial will depend on the circumstances of a particular case. ***Id.*** at 530-31. Ordinarily, a longer delay will be tolerated for complex cases than for straightforward ones. ***Id.*** at 531. In ***Green v. State***, 75 Wis. 2d 631, 250 N.W.2d 305 (1977), our supreme court determined that a delay approaching one year was presumptively prejudicial in an armed robbery case.

¶8 Here, the circuit court concluded that there was no presumptively prejudicial delay. The court reached this conclusion by excluding the seventy-five days that Hoeft was in federal custody when calculating the length of delay. The judge excluded this time based upon his previous experience as a prosecutor, stating that it is "virtually impossible" to get someone out of federal custody.

However, this determination was not based upon evidence in the record. No attempts were made to produce Hoeft from federal custody. No writ of habeas corpus was issued to federal authorities.

¶9 While federal authorities may not be compelled to honor a writ of habeas corpus issued by a state court, in ***State v. Eesley***, 225 Wis. 2d 248, 266, 591 N.W.2d 846 (1999), our supreme court noted that federal authorities have consistently honored such writs as a matter of comity. Absent any attempt to obtain Hoeft, there was no evidence that Hoeft's status as a federal prisoner made him unavailable to the State. Therefore, the circuit court's finding to that effect was clearly erroneous.

¶10 As a result, the seventy-five days during which Hoeft was in federal custody cannot be excluded, and the length of delay was greater than one year. The summons was issued on September 22, 2003, and Hoeft's trial occurred on November 5, 2004.[2] In light of ***Green***, the delay was presumptively prejudicial. Therefore, we must consider the other ***Barker*** factors.

¶11 Our supreme court applied the ***Barker*** factors in ***Green*** where the defendant, Green, was charged with armed robbery as party to the crime. ***Green***, 75 Wis. 2d at 635. Approximately one month after the complaint was filed, Green filed a motion to dismiss on the ground that he had been denied his right to a

[2] Hoeft's request for a substitution of judge should be charged against him. However, even excluding the time required for the substitution, the delay was over one year. Hoeft filed his request for a substitution of judge on December 3, 2003, and notice of the assignment was given on December 15.

speedy trial.[3] ***Id.*** at 636. The hearing on Green's motion was not heard until eleven and one-half months after his motion was filed. ***Id.*** In applying the ***Barker*** factors, our supreme court concluded that the nearly one-year delay was presumptively prejudicial. ***Id.*** The court determined that some portions of the delay were excusable, but others were not. ***Id.*** at 636-37. The court concluded that Green had asserted his right to a speedy trial by filing his motion to dismiss. ***Id.*** at 637. Finally, while the court determined that there was no evidence that the delay affected Green's ability to defend himself at trial, the court concluded that there was at least some minimal prejudice, insofar as the nearly one-year delay certainly caused Green anxiety and concern. ***Id.*** at 637-38.

¶12 Our supreme court then stated that the elements of delay to be weighed most heavily against the State "are (1) intentional delay designed to disadvantage the defendant, (2) a cavalier disregard of the defendant's right, (3) missing or forgetful witnesses, and (4) prolonged pretrial incarceration." ***Id.*** at 638. The court then concluded that none of these elements existed in Green's case, and therefore Green's speedy trial right was not violated. ***Id.***

¶13 In ***Borhegyi*** we found that one of these elements of delay—cavalier disregard of the defendant's right—did exist. ***Borhegyi***, 222 Wis. 2d at 513. Borhegyi was arrested for arson and criminal damage to property in August 1995. ***Id.*** at 508. He was formally charged four months later. ***Id.*** In February 1996, Borhegyi filed a demand for a speedy trial. ***Id.*** A trial was then held in January 1997, eleven months after Borhegyi's speedy trial demand and seventeen months

[3] Actually, two complaints were filed in ***Green v. State***, 75 Wis. 2d 631, 250 N.W.2d 305 (1977); the first was dismissed about a year after it was issued, and the second complaint, mentioned above, replaced it.

after he was arrested. ***Id.*** Applying ***Barker*** and ***Green***, we found the seventeen-month delay presumptively prejudicial. ***Id.*** at 510-12. We noted that the State did not explain the four-month delay between Borhegyi's arrest and filing of the complaint, nor did the State explain why a trial could not be scheduled more promptly. ***Id.*** at 513. The date that Borhegyi asserted his speedy trial right was undisputed. ***Id.*** at 514. And finally, we found at least minimal negligence because of anxiety and concern resulting from the delay. ***Id.*** at 514-15. Considering all the factors and concluding that the State's conduct reflected more than just negligence, evincing a cavalier disregard of Borhegyi's right, we determined that the State violated Borhegyi's right to a speedy trial. ***Id.*** at 520.

¶14 When analyzing Hoeft's case, it is apparent that the facts are less offensive than in ***Green*** or ***Borhegyi***. Regarding the second factor, reason for delay, this court has already rejected the State's argument that Hoeft's status in federal custody made him unavailable. The State also argues, and the circuit court found as a fact, that there were plea negotiations during the delay. This is based upon the prosecutor's statement that she had sent Hoeft's attorney a plea offer, to which neither Hoeft, nor his attorney, responded.[4] This fact suggests that Hoeft, or his attorney, acquiesced to some portion of the delay, which, to some degree, mitigates the State's failure to bring him to trial.

[4] We refer to Hoeft and his attorney in the alternative because Hoeft argues, and the circumstances suggest, that Hoeft and his attorney were not on the same page. Hoeft contends that, in December 2003, he told his attorney he wanted a speedy trial, and his attorney responded that he had strategic problems with a speedy trial demand. Hoeft also states that he told his attorney that he would not accept the prosecutor's plea offer, but his attorney never related that fact to the prosecutor. While we acknowledge Hoeft's argument that he asserted his speedy trial right to this attorney in December 2003, the fact remains that no notice of this assertion was given to the court or the State.

¶15 Regardless, this case appears to have fallen off the circuit court's calendar from February 19 until Hoeft's motion to dismiss in October. Altogether, this factor weighs against the State because the State was at least negligent in failing to move the case forward. While Hoeft, or his attorney, acquiesced to some of the delay, it is ultimately the State's obligation to bring a case to trial. ***Barker***, 407 U.S at 529.

¶16 The State's obligation to bring a case to trial is also related to the third factor—Hoeft's assertion of his speedy trial right. A defendant does not waive the right to a speedy trial by failing to assert it. ***Id.*** at 528-29. Nonetheless, failure to assert this right "will make it difficult for a defendant to prove that he was denied a speedy trial." ***Id.*** at 532. As previously mentioned, Hoeft, or his attorney, acquiesced to some portion of the delay. Once Hoeft asserted his right to a speedy trial in October, a trial date was set quickly. Under these circumstances, this factor weights against Hoeft.

¶17 In weighing prejudice, ***Barker*** identified three interests to consider: (1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern of the accused; and (3) to limit the possibility that the defense will be impaired. ***Id.*** at 532. Hoeft was already incarcerated for other reasons while awaiting trial in this case. Minimal prejudice to Hoeft may exist to the extent that Hoeft was anxious and concerned during the pendency of his case. *See* ***Green***, 75 Wis. 2d at 637-38; ***Borhegyi***, 222 Wis. 2d at 514-15. This anxiety and concern is reflected in Hoeft's statement at his motion hearing that these charges were affecting his eligibility for parole and for "minimum camp." However, the fact that Hoeft failed to assert his speedy trial right earlier suggests that this anxiety and concern was negligible. Finally, there is no evidence that the delay interfered with his defense.

¶18 After weighing the ***Barker*** factors, we conclude that the State's conduct does not rise to the level of cavalier disregard of Hoeft's speedy trial right, nor does it implicate any other element that our supreme court stated should be weighed most heavily against the State. *See* ***Green***, 75 Wis. 2d at 638. Once Hoeft asserted his right to a speedy trial, the State and the court acted to ensure that he got one.

By the Court.—Judgment affirmed.

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