COURT OF APPEALS
DECISION
DATED AND FILED

June 15, 2006

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. 2004AP2269-CR **Cir. Ct. No. 2001CF427**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID LEE MILLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dodge County: WILLIAM M. MCMONIGAL, Judge. *Affirmed*.

Before Lundsten, P.J., Dykman and Deininger, JJ.

¶1 PER CURIAM. David Lee Miller appeals a judgment convicting him of two counts of assault by a prisoner, and one count of escape. He also appeals an order denying postconviction relief. He was convicted and sentenced following a jury trial. He raises numerous issues on appeal. We affirm.

UNTIMELY PROBABLE CAUSE DETERMINATION AFTER ARREST, AND UNTIMELY PRELIMINARY HEARING

¶2 Miller committed his assaults and escape in June 2001, while a prisoner at Waupun Correctional Institution. The State charged him in this case on December 20, 2001. His initial appearance was on January 7, 2002, and his preliminary hearing was on January 24, 2002. Miller contends that his initial appearance was untimely under the forty-eight-hour rule set forth in ***County of Riverside v. McLaughlin***, 500 U.S. 44, 56 (1991). However, the forty-eight-hour requirement does not apply to those already in the State's custody for other reasons. ***State v. Harris***, 174 Wis. 2d 367, 377, 497 N.W.2d 742 (Ct. App. 1993). Further, Miller's preliminary hearing was not untimely. It was commenced within twenty days of his initial appearance. *See* WIS. STAT. § 970.03(2) (2003-04).[1] The ten-day rule that Miller cites only applies if the defendant's bail exceeds $500, and his did not. He was not placed on cash bail.

SPEEDY TRIAL

¶3 Two years and five months elapsed between commencement of this proceeding and Miller's trial. Miller claims the delay violated his constitutional right to a speedy trial. We disagree.

¶4 Despite Miller's assertion to the contrary, the record shows that Miller announced at his preliminary hearing that he did not want a speedy trial. There is no request of record after that. In any event, Miller fails to develop his

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

argument, and we decline to address this inadequately briefed issue. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

THE CHARGING DECISION AND DOUBLE JEOPARDY

¶5 Miller claims that he should have been charged under WIS. STAT. § 946.73, which provides misdemeanor penalties for violating a state law or rule made pursuant to state law governing a penal institution while in or on the grounds of a penal institution. His argument is frivolous. Section 946.73 conveys no intent to bar prosecutions of felonies committed on prison grounds.[2] If § 946.73 applied to his conduct, the State could have charged him with violating § 946.73 *in addition to* assault and escape. The State may bring multiple charges based on the same course of conduct, unless the charged offenses are identical in law and fact or the legislature intended only one charge for a particular course of conduct. *See* ***State v. Moffett***, 2000 WI 130, ¶¶14-15, 239 Wis. 2d 629, 619 N.W.2d 918.

¶6 Miller also contends that his double jeopardy rights barred prosecution for both assault and escape. However, assault by a prisoner and escape are not identical in either law or fact, nor did the legislature intend to allow only one charge for Miller's course of conduct. *See* ***id.*** Consequently, there was no double jeopardy violation.

[2] A prisoner's crime committed at the UW Hospital while the prisoner is in custody is considered a crime committed at the prison. *See* WIS. STAT. § 302.02(1m); ***State v. Cummings***, 153 Wis. 2d 603, 606, 451 N.W.2d 463 (Ct. App. 1989).

MIRANDA VIOLATION

¶7 Miller claims a violation of his ***Miranda*** rights during interrogations after his capture. If this in fact occurred, it was harmless beyond any doubt because the State never used any of his statements against him. Apart from limited exceptions, none of which apply here, alleged constitutional violations are subject to harmless error analysis. *See* ***State v. Hale***, 2005 WI 7, ¶¶109-11, 277 Wis. 2d 593, 691 N.W.2d 637.

PRETRIAL MOTIONS AND PRETRIAL RELEASE

¶8 The trial court decided a number of pretrial motions on written arguments and without a hearing. Miller presents only the conclusory statement that due process required a hearing on the motions. He does not develop the issue. We therefore decline to consider it. *See* ***Pettit***, 171 Wis. 2d at 646-47.

¶9 Miller also contends that he was entitled to release on bail pending his trial. As the State notes, his contention is pointless because he was serving a pre-existing prison sentence while awaiting trial. Also, Miller cites no authority for the proposition that there is an available postconviction remedy for his alleged pretrial release claim of error.

EXCESSIVE FORCE

¶10 Miller next makes a conclusory allegation that authorities used excessive force to obtain his confession. He cites no facts in the record supporting this allegation. In any event, as noted earlier, the State never used any statement of Miller's against him at trial.

SUBPOENAS

¶11 Miller complains that he was unable to obtain subpoena forms. However, Miller was represented by counsel, and he fails to explain why he could not have obtained his attorney's help in subpoenaing witnesses. Also, Miller fails to show how the lack of subpoenas prejudiced him. He does not even identify the witnesses he now says he wanted to call but could not.

SELF-REPRESENTATION DENIED

¶12 Miller alleges that he was denied the right to represent himself at trial. The issue is not adequately developed, and we do not consider it. *See* ***Pettit***, 171 Wis. 2d at 646-47.

INEFFECTIVE ASSISTANCE OF COUNSEL

¶13 Miller contends that trial counsel ineffectively represented him. Miller sought postconviction relief in the trial court, but failed to raise this issue. The issue is waived. *See* ***State v. Konrath***, 218 Wis. 2d 290, 296 n.8, 577 N.W.2d 601 (1998). Moreover, without a postconviction hearing on the alleged ineffectiveness, we may not grant relief on appeal. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

BIASED EXPERTS

¶14 Examining psychiatrists deemed Miller competent to stand trial, and concluded he did not have an NGI defense. Miller argues that the examining psychiatrists were biased against him. He raises this issue for the first time on appeal, and therefore waived it. *See* ***Konrath***, 218 Wis. 2d at 296 n.8.

THE PRESIDING JUDGE'S PARTIALITY

¶15 During the proceedings, Miller filed a notice of claim against the presiding judge and sought to have the judge removed. Judge McMonigal declared himself unbiased and refused to disqualify himself. Miller cites no facts in the record supporting his allegation of bias. We therefore reject his contention. *See* ***State v. McBride***, 187 Wis. 2d 409, 415-16, 523 N.W.2d 106 (Ct. App. 1994) (defendant's burden includes proof of actual bias).

RIGHT TO A DEFENSE

¶16 Miller asserts that he was barred from presenting certain meritorious defenses, including necessity and self-defense. His arguments are cursory. He cites no facts in the record to support them. His argument that he was entitled to escape because he had renounced his Wisconsin citizenship is frivolous.

EXCULPATORY EVIDENCE AND FALSE TESTIMONY

¶17 The officers who were Miller's victims testified they believed he had a gun. Shortly after the incident, Miller stated that he had soap carved in the shape of a gun. He now contends that the State had an obligation to produce the gun at trial, as evidence. However, Miller does not identify any information in the record showing that the State ever had the soap gun, assuming it existed. In any event, the elements of Miller's crimes do not require proof that Miller possessed an actual gun, so evidence that he possessed a soap gun would not have helped him.

¶18 Miller also asserts that authorities destroyed exculpatory photographs taken of him and his Waupun cell at some unspecified time. He fails, however, to explain their relevance, and the alleged photographs are not in the record. As for Miller's assertion that one of the officers lied during trial

testimony, that was a question of credibility for the jury to resolve. The jury, not this court, is charged with the duty of assessing witness credibility. *See* ***State v. Webster***, 196 Wis. 2d 308, 320, 538 N.W.2d 810 (Ct. App. 1995).

SLEEPING JUROR

¶19 Miller complained during the trial that a juror was sleeping while the trial court read the jury instructions. The court responded that it was watching the jurors, and saw no one sleeping. Miller took the issue no further. Consequently, there is nothing in the record that would permit us to overturn the trial court's factual finding that no juror was sleeping.

MILLER'S HANDCUFFS

¶20 Miller was handcuffed during parts of the trial. The court directed him to keep his handcuffs out of sight. Nevertheless, the jurors may have briefly seen him in handcuffs. Miller asked for a mistrial, but the trial court found that if the jurors saw the handcuffs, it was Miller's fault. Miller's argument is meritless. The record does not establish that the jurors saw Miller in handcuffs. Further, there is nothing to contradict the trial court's finding that, if jurors saw the handcuffs, it was Miller's fault.

EX POST FACTO SENTENCING

¶21 The trial court sentenced Miller under provisions of the truth-in-sentencing law. He contends that this law was applied to him ex post facto. He is incorrect. He committed his crimes in June 2001. The first phase of Wisconsin's truth-in-sentencing law was enacted in June 1998, and applied to offenses committed on or after December 31, 1999. 1997 Wis. Act 283, § 419.

VENUE

¶22 Miller escaped and assaulted the officers in Dane County, at the University of Wisconsin Hospital. He was charged in Dodge County. Miller argues that the trial court erroneously denied his motion for a change of venue to Dane County. We disagree. Dodge County is the proper venue to prosecute a Waupun Correctional Institution inmate who, like Miller, commits a crime while under the jurisdiction of that institution, regardless of the physical location of the crime. *See* WIS. STAT. § 302.02(1m)(a).

INCOMPLETE RECORD

¶23 Miller notes that the court reporter read a portion of the trial testimony to the jury during its deliberations. The portion read is described in the transcript, but the court reporter's reading of the testimony was not transcribed. Miller contends that this amounts to an incomplete record. We disagree. A record is not incomplete because identical testimony does not appear twice.

INCORRECT TRANSCRIPT

¶24 During the proceedings before the trial court, when Miller questioned whether he would receive a speedy trial, the court pointed to Miller's assertion at the preliminary hearing that he did not want a speedy trial. Miller contends that a correct transcript would show that he said only that he did not want a speedy trial under the Interstate Detainer Act. We need not resolve this argument. It remains undisputed that Miller did not request a speedy trial. Furthermore, he has failed to establish that his constitutional right to a speedy trial was violated.

SUMMARY

¶25 Miller raises a number of other issues that either duplicate issues we have already addressed or are so undeveloped that they do not merit a response. For these reasons, and the reasons above, we affirm the trial court.

By the Court.—Judgment and order affirmed.

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