

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 14, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-1227-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

JAMES R. SCHILLER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Oconto County:
LARRY JESKE, Judge. *Reversed and cause remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. The State appeals an order dismissing with prejudice a criminal complaint filed against James Schiller for possession of a firearm by a felon. The State argues that the trial court erred because Schiller has not shown prosecutorial delay warranting dismissal with prejudice and he has not

shown that the charges were based on selective or retaliatory prosecution. We agree and reverse the trial court.

BACKGROUND

¶2 The criminal complaint, charging Schiller with possession of a firearm as a felon,¹ alleged that Schiller had been convicted of a felony in 1990. It further alleged that Nicole Kesler, who was living with Schiller, found a firearm and bullets in his dresser drawer on December 31, 1997. She called the police and asked them to remove the weapon from the house, which they did. The criminal complaint was filed on August 19, 1999, approximately twenty months after the police seized the firearm.

¶3 Before the case went to trial, Schiller asked the trial court to dismiss the complaint against him because the prosecution had unnecessarily delayed filing the complaint and selectively or retaliatorily prosecuted him.² The trial court concluded that the prosecution had delayed “just too long to enable [Schiller] to properly defend himself in this felony charge” and dismissed the complaint with prejudice. This appeal followed.

STANDARD OF REVIEW

¶4 We will overturn the court’s decision if it erroneously exercised its discretion by incorrectly applying the facts to the accepted legal standards. *See State v. Kuntz*, 160 Wis. 2d 722, 745, 467 N.W.2d 531 (1991). We defer to the

¹ See WIS. STAT. § 941.29(2)(a). All references to Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

² Schiller claimed that the firearm possession charge was belatedly filed as a result of his failure to cooperate with a drug investigation.

circuit court's findings of historical facts as they relate to the constitutional challenge unless they are clearly erroneous. *See State v. McMorris*, 213 Wis. 2d 156, 165, 570 N.W.2d 384 (1997). However, we apply those facts to the constitutional standard independently of the circuit court's decision. *See id.*

DISCUSSION

¶5 The State argues that the trial court failed to apply the two-part test that governs a due process claim of prosecutorial delay. *See State v. Hall*, 196 Wis. 2d 850, 877, 540 N.W.2d 219 (Ct. App. 1995), *rev'd on other grounds*, 207 Wis. 2d 54, 557 N.W.2d 778 (1997). The State contends that a trial court must find (1) "actual prejudice" from the twenty-month delay and (2) that the timing of the complaint arose from an improper prosecutorial motive or purpose, such as to gain a tactical advantage over the accused. *See id.* Further, it argues that Schiller failed to show that the circumstances satisfy these two prongs. We agree.

¶6 A defendant's primary protection against an overly stale criminal charge is the statute of limitations. *See State v. Wilson*, 149 Wis. 2d 878, 903, 440 N.W.2d 534 (1989). Schiller does not argue that the statute of limitations had expired in this case.³ Rather, he argues that his due process rights were violated. A defendant proves a due process violation by showing both actual prejudice in

³ Schiller was charged approximately 20 months after the crime was allegedly committed. The statute of limitations for the crime at issue is six years. *See* WIS. STAT. § 939.74(1).

the delay and an improper prosecutorial motive or purpose. *See id.* at 904-05. Schiller concedes that he bears the burden to prove both prongs stated above.⁴

a. Actual prejudice

¶7 The court did not find that actual prejudice had occurred. It merely spoke generally about how delays may cause loss in memories and evidence. Schiller does not contend on appeal that any physical evidence has been lost, any witnesses have disappeared, or that there is any evidence that witnesses' memories have faded as a result of the time elapsed from the seizure to the filing of the complaint. The trial court erred by not resting its decision on a finding of actual prejudice, and the record would not support such a finding.

b. Improper prosecutorial motive or purpose

¶8 A prosecutor "has great discretion in determining whether ... to prosecute." *See State v. Johnson*, 74 Wis. 2d 169, 173, 246 N.W.2d 503 (1976) (citation omitted). In deciding whether to bring a charge, the prosecutor may consider "the cooperation [and by implication lack of cooperation] of the accused in the apprehension or conviction of others." *United States v. Lovasco*, 431 U.S. 783, 794 n.15 (1977) (citation omitted). However, the State may not "deliberately with[o]ld the charge to disadvantage the defendant, to harass him or to punish him in any way." *Wilson*, 149 Wis. 2d at 905 (citation omitted).

⁴ Schiller argues that the State waived its right to appeal the trial court's order by not specifically raising the *Wilson* test in the trial court. *See State v. Wilson*, 149 Wis. 2d 878, 904-05, 440 N.W.2d 534 (1989). The State objected on the record to the order now on appeal and had no duty to present Schiller's case when he failed to argue the appropriate standard. Waiver is a matter of judicial policy rather than jurisdictional prerequisite. *See Wirth v. Ehly*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980). Because the trial court failed to apply the proper analysis, we will address the State's arguments.

¶9 The trial court noted that police departments have “from time to time ... pressure[d] witnesses to come forward with testimony and hold things over their head in an effort to get the information that they need in order to bring a prosecution. ... I have a feeling that it probably happened here.” The court, however, did not address whether the evidence showed “improper motive or purpose” as defined in the case law. *Wilson*, 149 Wis. 2d at 904-05. The trial court did not find that the reason for the delay disadvantaged the defendant, harassed him or punished him in any way. *See id.* at 905. Again, the record would not support such a finding.

¶10 Although Schiller argued alternatively that the State selectively or retaliatorily prosecuted him, the trial court did not dismiss on those grounds. The court did not address this second argument. Because this argument was not a basis for the court’s decision, we do not discuss it further.

¶11 Finally, Schiller asks this court to remand for findings relevant to whether the State breached a nonprosecution agreement. Schiller, however, did not cross appeal, so his request is not properly before us. *See Cooper v. City of Milwaukee*, 97 Wis. 458, 466, 72 N.W. 1130 (1897) (error adversely affecting only a non-appealing party will not be considered).

¶12 Schiller did not prove and the trial court therefore could not find that as a result of the delay in prosecution, he suffered both actual prejudice and that the prosecution was delayed to disadvantage, harass or punish Schiller in any way. We therefore reverse the trial court’s order dismissing the criminal complaint, direct the trial court to reinstate it and remand for further proceedings.

By the Court.—Order reversed and cause remanded.

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

