COURT OF APPEALS
DECISION
DATED AND FILED

October 3, 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. 2006AP546-CR

Cir. Ct. No. 2003CF72

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD ALAN HOEFT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Bayfield County: JOHN P. ANDERSON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Richard Hoeft appeals an order vacating his conviction for burglary and dismissing the charge without prejudice. Hoeft argues the dismissal should have been with prejudice. We conclude the trial court appropriately exercised its discretion and, accordingly, we affirm the order.

Background

¶2 Hoeft was arrested on July 19, 2003, for crimes committed in Bayfield County. On August 12, he was charged with one count of burglary, one count felony theft, and one count criminal damage to property. His initial appearance was on September 2. He waived a preliminary hearing and an Information mirroring the complaint was filed on September 11.

¶3 In mid-May 2004, while incarcerated at the Stanley Correctional Facility for sentences in other cases, Hoeft sent a letter to the warden, requesting prompt disposition of this case and others, pursuant to the Interstate Detainer Act, WIS. STAT. § 971.11.[1] The request was not forwarded to the district attorney.

¶4 On January 20, 2005, Hoeft filed a motion to dismiss his case, alleging a speedy trial violation. At a March 29 hearing on the motion, only Hoeft testified on his own behalf. He stated he had sent the request to the warden; he had written his attorney twice to ask the attorney to request a speedy trial; he had been denied a transfer to a work release camp because of the pending Bayfield County charges; and that beginning in May 2004, he was having intestinal problems from stress. The court denied his motion, saying Hoeft had not shown he had contacted the warden.

¶5 Hoeft's trial was April 1, 2005. The jury convicted him of burglary but acquitted him of the theft and criminal damage charges. Hoeft filed a motion for postconviction relief, again alleging a speedy trial violation and adding an

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

ineffective assistance of counsel claim. This time, the Stanley Correctional Facility registrar was called as a witness. She testified the warden had received Hoeft's request and forwarded it to her for disposition, but no action had been taken because none of the cases he referenced had resulted in a detainer.

¶6 This time, the court ultimately concluded Hoeft had met his burden under WIS. STAT. § 971.11. The court also held trial counsel had been ineffective for failing to call the registrar for the March hearing. The court vacated Hoeft's burglary conviction and dismissed the complaint without prejudice. The court dismissed the case without prejudice because it concluded the State was not at fault for the delay when the request had not been forwarded to it; that Hoeft's liberty interest did not suffer because he was incarcerated on other matters; and that there was no evidence of record that his participation in any program or rehabilitation had been impacted by the delay. Hoeft appeals.

Discussion

¶7 WISCONSIN. STAT. § 971.11 states, in relevant part:

> (1) Whenever the warden or superintendent receives notice of an untried criminal case pending in this state against an inmate of a state prison, the warden or superintendent shall, at the request of the inmate, send by certified mail a written request to the district attorney for prompt disposition of the case. …
>
> (2) If the crime charged is a felony, the district attorney … shall bring the case on for trial within 120 days after receipt of the request subject to s. 971.10.
>
> ….
>
> (7) If the district attorney moves to dismiss any pending case or if it is not brought on for trial within the time specified in sub. (2) or (3) the case shall be dismissed …. Nothing in this section prevents a trial after the period

> specified in sub. (2) or (3) if a trial commenced within such period terminates in a mistrial or a new trial is granted.

¶8 When a defendant makes a request pursuant to WIS. STAT. § 971.11(1), and the State fails to bring the case to trial within the time limit of § 971.11(2), the trial court has the discretion under § 971.11(7) to dismiss the case with or without prejudice. *See* ***State v. Davis***, 2001 WI 136, ¶27, 248 Wis. 2d 986, 637 N.W.2d 62. This court will affirm a discretionary decision as long as a trial court considers the correct law and relevant facts of record, then reasons its way to a rational conclusion. *See* ***id.***, ¶28.

¶9 There are multiple factors the trial court should consider when determining whether to dismiss a case with or without prejudice, including but not limited to:

> the reasons for and the length of the delay …; whether the nature of the case makes it unreasonable to expect adequate preparation within the statutory time period; an accused's conduct contributing to the delay; an accused's waiver of the statutory right to prompt disposition; the harm to an accused resulting from the delay, such as anxiety and concern; the effect of the delay on an accused's legal defenses; the effect of the delay on the programs and movement within the institutions available to an accused; the effect of the delay on the orderly rehabilitation process of an accused within the Department of Corrections; the effect of the delay on an accused's concurrent sentencing possibilities; the effect of the delay on an accused's possible transfer to a less secure facility; the effect of the delay on an accused's opportunity for parole; the effect of the delay on the transfer of the accused to another institution; the effect of the delay and dismissal on the public interest in the prompt prosecution of crime; and the effect of the delay and dismissal on the victim.

Id., ¶29 (footnote omitted).

¶10 Hoeft asserted that he was denied parole; he was denied transfer to a less secure facility offering work release; and he suffered stress, all because of the

pending Bayfield County charges. The trial court concluded that "the State was not at fault, because of the notice."[2] It also considered that Hoeft was incarcerated on other matters, so his liberty interest was not harmed, and there was no competent evidence that this pending charge resulted in denial of parole or participation in other programs within the prison system.

¶11 Hoeft asserts the trial court erroneously exercised its discretion because more factors weighed in favor of dismissing with prejudice than weighed in favor of dismissing without prejudice. However, Hoeft offers no authority for the proposition that, when multiple factors exist for the court's consideration, a decision is based solely on total numbers with no weight assigned to factors. If the court were not free to weigh factors against each other—that is, if the court went strictly by the quantity of factors present—the court's decision would not be discretionary.

¶12 In any event, Hoeft offers no evidence his "anxiety and concern" stem solely from the Bayfield County case. He had been convicted, charged, or sentenced in at least six other counties over the course of this case, and he faced federal charges.

[2] It is true that the State, as a party to the litigation represented by a district attorney, had no notice of Hoeft's request to the warden. In addition, WIS. STAT. § 971.11(2) requires the district attorney bring the case to trial within 120 days "after receipt of the request." The statute does not, however, specify whose receipt—the warden's or the district attorney's. If the statute means the district attorney's receipt of the request, then the court was correct to find the State, as represented by the district attorney, had no notice.

However, it is also arguable that the warden, as the head official of a state corrections facility, is an agent of the State. We therefore are not entirely convinced we should say the State, as an all-encompassing legal entity, lacked notice. We need not resolve the issue, however, because Hoeft does not raise it.

¶13 In addition, when Hoeft appeared before the parole board, the pending Bayfield County charges were not his only obstacle. He was awaiting sentence in Ashland County and had just been sentenced in Rusk County. Moreover, there were charges pending in "several jurisdictions" at the time of his review. Accordingly, we have no reason to believe the parole board would have granted parole absent this pending charge. As far as his assertion that he was denied participation in a work release camp at a lower-security facility, the only evidence Hoeft offered was his own testimony, and it is evident that the court discredited this testimony. *See* WIS. STAT. § 805.17(2).

¶14 But Hoeft also never raised the prejudice issue in the trial court. To be preserved for appeal, issues should generally be raised first in the trial court. More importantly, Hoeft appears to have conceded that any dismissal would be without prejudice. The trial court asked him, "if you're right, wouldn't my discretion then be just to dismiss without prejudice?" Hoeft's attorney responded, "Yes …." The State included these last two arguments—preservation and concession—in its response brief; Hoeft filed no reply. Arguments not refuted are deemed admitted. ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

By the Court.—Order affirmed.

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