COURT OF APPEALS
DECISION
DATED AND FILED

January 23, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1521 **Cir. Ct. No. 2004JV21**

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

IN THE INTEREST OF TYLER J.K., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

TYLER J. K.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Reversed and cause remanded with directions.*

¶1 ANDERSON, P.J.[1] Tyler J. K. appeals from an order of delinquency and from a postdispositional order denying his motion to vacate an amended dispositional order because his constitutional right to a speedy trial had been violated. Tyler asserts that the bulk of the 959 days the fact-finding hearing was delayed is attributable to the State, specifically 504 days consumed by the State's interlocutory appeal, which was ultimately voluntarily dismissed by the State. He contends that his late demand for a speedy trial should not be weighed against him. Finally, Tyler also claims that the delay was prejudicial because it increased his anxiety and concern and fogged the memory of important witnesses. We conclude that Tyler was denied his constitutional right to a speedy trial and reverse.

¶2 The ultimate question is whether Tyler's constitutional right to a speedy trial was violated. The following chart serves to demonstrate the relevant pretrial matters, which figure into our consideration and resolution of the speedy trial issue:

February 18, 2004	Delinquency petition filed, alleging a single act of sexual assault of a child under thirteen years of age.
March 8, 2004	Initial appearance.
March 29, 2004	Hearing on State's motion to quash subpoenas seeking school records pursuant to WIS. STAT. § 118.125. Status conference; trial court denies the motion.
April 12, 2004	Hearing on State's motion to reconsider; trial court denies the motion.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

May 4, 2004	State files a petition for leave to appeal.
May 18, 2004	Petition for leave to appeal is granted and Case No. 2004AP1237 is assigned.
January 26, 2005	Appeal is certified to the Wisconsin Supreme Court.
March 8, 2005	Supreme court issues an order holding certification in abeyance pending action on another case.
August 25, 2005	The supreme court grants the certification.
September 23, 2005	The State files a notice of voluntary dismissal.
October 18, 2005	The supreme court grants the State's notice and vacates its acceptance of the certification.
November 1, 2005	Record is remitted to the circuit court.
November 3, 2005	Status conference.
November 18, 2005	Status conference.
December 14, 2005	Tyler files a motion for a speedy trial.
December 16, 2005	Status conference.
February 17, 2006	Status conference. Court denies Tyler's speedy trial motion.
March 17, 2006	Status conference.
April 17, 2006	Status conference.
May 5, 2006	Status conference.
June 14, 2006	Status conference.
Jul 17, 2006	Status conference.
July 31, 2006	Status conference.
September 6, 2006	Status conference.
September 15, 2006	Status conference.

October 3, 2006 Start of fact-finding hearing.

¶3 Tyler filed a postdispositional motion asserting that his constitutional right to a speedy trial had been violated. The trial court denied the motion; while acknowledging that there had been "some substantial delay in prosecuting this case," it held:

> I am satisfied that the juvenile got a fair trial even after substantial delay here. There may be some implied prejudice because of the amount of time, but there was no actual prejudice.

Tyler appeals.

¶4 The question on appeal is whether the 959 days between the filing of the petition and the start of the trial violated Tyler's constitutional right to a speedy trial.[2] In ***State v. Urdahl***, 2005 WI App 191, ¶11, 286 Wis. 2d 476, 704

[2] WISCONSIN STAT. § 971.10 establishes a separate statutory right to a speedy trial that is not implicated in this case. As the Wisconsin Supreme Court explains, the analysis and remedy are different:

> The statutory speedy trial right, on the other hand, is significantly different from the constitutional right both in the manner in which a violation is determined and in the remedy afforded. Rather than requiring a case-by-case determination of whether a particular delay is justified, [WIS. STAT. §] 971.10(2), Stats., sets forth a specific period of time within which a defendant charged with a felony must be brought to trial after a proper demand is made. Although this time period may be extended by a continuance granted by the court, sub. (3) of [§] 971.10 provides that a continuance should be granted only if it is determined that the ends of justice served by it outweigh the interest of the public and the defendant in a speedy trial. In addition, instead of dismissal of the charges pending against a defendant who is denied the constitutional right to a speedy trial, the remedy afforded by [§] 971.10 is simply release from custody or from the obligations of bond pending trial.

State ex rel. Rabe v. Ferris, 97 Wis. 2d 63, 67-68, 293 N.W.2d 151 (1980).

N.W.2d 324, we summarized the state of the law when confronting a claim of denial of the constitutional right to a speedy trial:

> Both the Sixth Amendment to the United States Constitution and article I, section 7 of the Wisconsin Constitution guarantee an accused the right to a speedy trial. In order to determine whether an accused's right to a speedy trial has been violated under the Federal Constitution, we use the four-part balancing test established in [***Barker v. Wingo***, 407 U.S. 514, 530 (1972)], and we use the same test under the Wisconsin Constitution. ***Day v. State***, 61 Wis. 2d 236, 244, 212 N.W.2d 489 (1973). We consider (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his [or her] right; and (4) prejudice to the defendant. ***Barker***, 407 U.S. at 530. The right to a speedy trial is not subject to bright-line determinations and must be considered based on the totality of circumstances that exist in the specific case. ***Id***. Essentially, the test weighs the conduct of the prosecution and the defense and balances the right to bring the defendant to justice against the defendant's right to have that done speedily. ***Id***. The only remedy for a violation of the right to a speedy trial is dismissal of the charges. ***Id***. at 522.

Urdahl, 286 Wis. 2d 476, ¶11 (footnote omitted).

¶5 Whether Tyler has been denied his constitutional right to a speedy trial is a question of law, which we review de novo. ***State v. Leighton***, 2000 WI App 156, ¶5, 237 Wis. 2d 709, 616 N.W.2d 126. The circuit court's findings of fact are accepted unless they are clearly erroneous. ***Id.***

¶6 Several of the ***Barker*** factors need not detain us long. The first factor, length of the delay, weighs in Tyler's favor because any delay of one year or more is presumptively prejudicial. *See* ***Urdahl***, 286 Wis. 2d 476, ¶12. The delay in this case was 959 days; it is presumptively prejudicial and we move on to consider the other three factors. *See* ***Hatcher v. State***, 83 Wis. 2d 559, 566-67, 266 N.W. 2d 320 (1978) ("The first factor presents a threshold question—is the

length of delay presumptively prejudicial—which must be answered in the affirmative before inquiry can be made into the remaining three factors.").

¶7 The third factor, Tyler's assertion of his constitutional right to a speedy trial, does not weigh in his favor. While he formally asserted that right on December 14, 2005, his actions after that belie his desire for a speedy trial.[3] ***United States v. Loud Hawk***, 474 U.S. 302, 314 (1986) ("Here, respondents' speedy trial claims are reminiscent of Penelope's tapestry.").

¶8 The court denied Tyler's request for a speedy trial at a status conference on February 17, 2006. At the same conference, the court granted his ***Shiffra/Green***[4] motion for certain records to be sent to the court. Tyler's proposed orders memorializing the court's ruling was objected to on four occasions by the State and each was rejected by the court. If Tyler truly wanted a speedy trial, his first attempt to memorialize the court's ruling should have been limited to the actual ruling. Tyler consumed at least 119 days in his effort to memorialize the court's February 17, 2006 ruling.[5]

¶9 The fourth factor, prejudice to Tyler, we weigh slightly in his favor. We begin the analysis by noting that the presumption that pretrial delay has

[3] Tyler's formal assertion of his constitutional right to a speedy trial was not made until 656 days after the delinquency petition was filed on February 18, 2004.

[4] ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993); ***State v. Green***, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298.

[5] The 119 days encompass the time between February 17, 2006, when the court granted Tyler's motion, until July 17, 2006, when the court held that there was nothing relevant in the records ultimately produced.

prejudiced the accused intensifies over time, ***Urdahl***, 286 Wis. 2d 476, ¶12, and here the prejudice is intensified by a 959-day delay.

> Courts consider the element of prejudice with reference to the three interests that the right to a speedy trial protects: prevention of oppressive pretrial incarceration, prevention of anxiety and concern by the accused, and prevention of impairment of defense. The third interest is the most significant because "the inability of a defendant [to] adequately … prepare his case skews the fairness of the entire system." While prejudice is an important factor in the analysis, it is not necessary that a defendant show prejudice in fact in order to establish a speedy trial violation.

Id., ¶34 (citations omitted).

¶10 We agree with Tyler that as he approached his seventeenth birthday the possibility of being waived into adult court increased his anxiety and concern. It is reasonable to infer that as he grew older Tyler was aware that the treatment he received in the juvenile system would differ from the treatment in the adult system. It is because of the increase in anxiety and concern that we weigh the fourth factor slightly in Tyler's favor.[6]

¶11 We turn to the second factor, the reason for the delay. There are three classes of reasons for delay and different weights are to be assigned in each class. ***Barker***, 407 U.S. at 531. The first class is "[a] deliberate attempt to delay the trial in order to hamper the defense" which "should be weighted heavily

[6] Tyler argues that there was an impairment of his defense because two of his witnesses, his mother and his sister, had trouble remembering events that occurred as far back as 1112 days before the start of the trial—the delinquency petition alleged that the events happened between September 1 and December 9, 2003. However, we are not unmindful that the State, which must prove its case beyond a reasonable doubt, may also be prejudiced by the passage of time, which could fog its witnesses' memories. *See* ***United States v. Loud Hawk***, 474 U.S. 302, 315 (1986).

against the government." ***Id.*** (footnote omitted). The second class is "[a] more neutral reason such as negligence or overcrowded courts" which "should be weighted less heavily" against the government. ***Id***. The third class is "a valid reason, such as a missing witness," which "should serve to justify appropriate delay." ***Id.***

¶12 We will focus on the State's interlocutory appeal which consumed 504 days or approximately fifty-three percent of the entire delay.[7] The State appealed the trial court's nonfinal order dismissing the State's motion to quash subpoenas issued by Tyler's counsel, under WIS. STAT. § 118.125(2)(f), for the victim's school records. The interlocutory appeal does not fit into the third class of delay; the question is whether it is to be given the weight against the State assigned to the first class or assigned to the second class.

¶13 In ***Loud Hawk***, the government brought an interlocutory appeal of a district court's granting of a motion to suppress evidence. ***Loud Hawk***, 474 U.S. at 307. The district court denied the government's request for a continuance and three weeks later when the government stated that it was not ready to proceed to trial, the district court dismissed the indictment with prejudice. ***Id.*** The government immediately appealed the dismissal and the two appeals were consolidated. ***Id.*** Approximately 1178 days after the district court dismissed the indictment, the Ninth Circuit Court of Appeals reversed the suppression order and the dismissal order. ***Id.*** at 307-08. Some forty-six months passed between the

[7] The cause of the delay that consumed the remaining 451 days can roughly be divided among the State, Tyler and the court.

government filing its first notice of appeal and the issuance of the mandate of the Ninth Circuit. ***Id.*** at 308.

¶14 After remand, the district court issued a series of rulings that triggered both sides taking interlocutory appeals to the Ninth Circuit. ***Id.*** at 309. Although the Ninth Circuit expedited the appeal and heard argument only 149 days after the district court ruled it did not issue its decision for another 562 days. ***Id.*** The government's position was again sustained by the Ninth Circuit and the case was remanded back to the district court for a second time. ***Id.*** Just before the trial was to start, the district court dismissed the indictment on the ground that the defendant's Sixth Amendment right to a speedy trial had been violated. ***Id.*** at 310. The Ninth Circuit affirmed and the U.S. Supreme Court granted certiorari. ***Id.***

¶15 The U.S. Supreme Court tackled the issue of "how to weigh the delay occasioned by an interlocutory appeal when the defendant is subject to indictment or restraint." ***Id.*** at 312. It began by noting the important public interests in the Sixth Amendment's guarantee of a speedy trial and in the orderly appellate review of suppression motions or motions to dismiss to insure that motions are correctly decided. ***Id.*** at 312-13. The majority in ***Loud Hawk*** found that the ***Barker*** test furnishes the flexibility needed to take into account the competing interests of orderly appellate review and a speedy trial. ***Id.*** at 314. The majority wrote, "Given the important public interests in appellate review, it hardly need be said that an interlocutory appeal by the Government ordinarily is a valid reason that justifies delay." ***Id.*** at 315 (citation omitted). But courts are still required to conduct a case-by-case analysis of the affect of the appeal on speedy trial rights.

> In assessing the purpose and reasonableness of such an appeal, courts may consider several factors. These include

> the strength of the Government's position on the appealed issue, the importance of the issue in the posture of the case, and—in some cases—the seriousness of the crime. For example, a delay resulting from an appeal would weigh heavily against the Government if the issue were clearly tangential or frivolous.

Id. at 315-16 (citation omitted).[8]

¶16 The majority refused to assign any weight to the delays occasioned by the government's two interlocutory appeals because there had been "no showing of bad faith or dilatory purpose on the Government's part." ***Id.*** at 316. The majority considered the government's position to be strong; the Ninth Circuit's multiple reversals of the district court were prima facie evidence of the reasonableness of the government action. ***Id.***

¶17 Turning to this case, we cannot reach the same result as the majority in ***Loud Hawk***. While there has been no showing of a dilatory purpose on the State's part, there are other factors that require us to weigh the State's interlocutory appeal heavily against it. The usual purpose of granting the State the right to appeal from orders suppressing confessions or evidence serves the public interest in appellate review.

> More importantly and more frequently, however, erroneous exclusionary rulings frustrate the primary purpose of the trial; to ascertain the truth of the charges. Social policies embodied in statutory or constitutional provisions may justify encumbering the fact-ascertaining process, but the exclusion of otherwise probative and admissible evidence based solely upon an incorrect interpretation of those provisions serves neither the policy represented by the

[8] The Wisconsin Supreme Court has addressed the impact of an interlocutory appeal on statutory speedy trial rights. It concluded that a stay of proceedings in the trial court, issued by the court of appeals when an interlocutory appeal is filed by the State, tolls the time clock of WIS. STAT. § 971.10. ***Ferris***, 97 Wis. 2d at 70.

> provision nor the public's interest in an accurate resolution of the factual questions involved in the litigation. Permitting such decisions to escape review encourages their proliferation and denies trial courts desirable guidance. Allowing interlocutory review ensures proper application of the governing rules and at the same time protects the ability of the trial court to determine the truth of the factual allegations involved.

People v. Young, 412 N.E.2d 501, 506-07 (Ill. 1980). However, here the State did not appeal seeking to recover important evidence, erroneously excluded, needed to meet its heavy burden of proof. No, here the State appealed seeking to block Tyler's use of evidence that, by statute, would be limited to being used for impeachment purposes. WIS. STAT. § 118.125(2)(f).[9] This was a "He Said—He Said" case; Tyler's inability to impeach his accuser would hamper his ability to completely defend himself. *See* ***State v. Thiel***, 2003 WI 111, ¶46, 264 Wis. 2d 571, 665 N.W.2d 305.

> The credibility of the complaining witness was paramount to this case. In this situation, trial counsel was aware of the need to locate any evidence or information to impeach the complainant's testimony, regardless of what was found in the discovery. The case was a classic instance of the "he-said-she-said" dilemma.

¶18 The State's position was not strong. The State's notice of voluntary dismissal is prima facie evidence of the lack of strength of it case just as the two reversals by the Ninth Circuit were prima facie evidence of the strength of the

[9] WISCONSIN STAT. § 118.125(2)(f) provides:

> Pupil records shall be provided to a court in response to subpoena by parties to an action for in camera inspection, to be used only for purposes of impeachment of any witness who has testified in the action. The court may turn said records or parts thereof over to parties in the action or their attorneys if said records would be relevant and material to a witness's credibility or competency.

government's position in ***Loud Hawk***. The weakness of the State's position is reflected in its notice of voluntary dismissal where the State noted, "Based on the positions of the parties in this particular case, the State is not convinced that the trial court erred in denying the State's motion to quash." The notice of voluntary dismissal came twenty-eight days after the supreme court granted certification and twenty-five days later the Wisconsin Supreme Court entered an order dismissing the State's interlocutory appeal.

Conclusion

¶19 After assessing the four ***Barker*** factors, we weigh the length of the delay, the reason for the delay and prejudice to the juvenile in favor of Tyler. Our analysis concludes with the balance in favor of Tyler and his assertion that he was denied his constitutional right to a speedy trial. Therefore, we reverse and remand to the circuit court with directions to order the WIS. STAT. ch. 938 delinquency petition to be dismissed with prejudice. *See* ***State v. Braunsdorf***, 98 Wis. 2d 569, 586, 297 N.W.2d 808 (1980).

By the Court.—Orders reversed and cause remanded with directions.

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