

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 13, 2002

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. 01-2869-CR

Cir. Ct. No. 98-CF-4244

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MELVIN D. PARKER, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: JOHN W. ROETHE, Judge. *Affirmed.*

Before Vergeront, P.J., Roggensack and Deininger, JJ.

¶1 PER CURIAM. Melvin Parker appeals a judgment convicting him of burglary, Class E felony theft, and misdemeanor bail jumping, as a repeater. He also appeals an order denying postconviction relief. The issues are whether Parker's constitutional speedy trial right was violated, and whether the trial court properly decided his postconviction motion without a hearing. We affirm.

¶2 The State filed its multi-count complaint in December 1998. The preliminary hearing occurred on January 29, 1999, and the arraignment was on February 9, 1999. Parker entered a not guilty plea and asked for a trial. In April, defense counsel appeared at a status conference, without Parker, and questioned Parker's competency. However, the Department of Corrections (DOC) failed to make Parker, who was imprisoned for a prior offense, available for a hearing on the question until June. At that time the court ordered a competency evaluation.

¶3 Additional delays attributable to the DOC postponed resolution of the competency issue until January 2000. Upon concluding that Parker was competent, the trial court scheduled his trial for February 14, 2000. However, just before that date defense counsel and Parker jointly requested counsel's withdrawal. The court granted the motion, and postponed the trial to allow time for replacement counsel to prepare.

¶4 Trial to the court occurred in June 2000. The court found Parker guilty of the burglary and theft charges and acquitted him on other charges. He subsequently entered a plea to the misdemeanor bail jumping charge.

¶5 After entry of the conviction Parker filed a postconviction motion raising the speedy trial issue. The trial court denied the motion without a hearing, resulting in this appeal.

¶6 The constitutional right to a speedy trial is found in the Sixth Amendment to the United States Constitution, and in article I, section 7 of the Wisconsin Constitution. Whether the constitutional right to a speedy trial has been violated is a question this court reviews de novo. *See State v. Zeganhagen*, 73 Wis. 2d 656, 664, 245 N.W.2d 650 (1976). However, the trial court's

underlying findings of historical fact are sustained unless they are clearly erroneous. *Id.*

¶7 In reviewing a speedy trial claim we first consider the length of the delay until trial. *State v. Borhegyi*, 222 Wis. 2d 506, 510, 588 N.W.2d 89 (Ct. App. 1998). If the delay is deemed presumptively prejudicial merely by its length, we then consider the government's role in the delay, whether the defendant asserted the right to a speedy trial, and whether the delay actually prejudiced the defendant. Upon consideration of these factors, the totality of the circumstances determines if there was a speedy trial violation. *Id.*

¶8 Parker's constitutional speedy trial right was not violated. For purpose of this analysis, we deem the eighteen-month delay between charging and trial presumptively prejudicial. Of those eighteen months, the State is admittedly responsible for the delay between April 24 and December 8, 1999, when the DOC neglected to produce Parker for various competency proceedings. However, the same is not true of the period prior to April 24, 1999, or that after December 8, 1999. The former consisted of promptly held preliminary proceedings and a reasonable period of trial preparation. The time between December 8, 1999 and February 14, 2000, is attributable to the competency proceeding and a brief period of trial preparation. After that, Parker's last minute decision to discharge counsel caused the remaining delay.

¶9 The second factor in the analysis is whether Parker asserted his speedy trial right. The record shows that Parker first demanded a speedy trial in January 2000, and his request was accommodated with a February trial date. Although Parker contends that he actually first presented a speedy trial demand at his February 9, 1999 arraignment, the record does not bear out his claim. At that

hearing Parker requested a trial merely as an alternative to pleading guilty, not as an assertion of his speedy trial right.

¶10 The third factor is whether Parker suffered prejudice from the delayed trial, or at least that part of the delay attributable to the State and not to him. Parker did not suffer unnecessary pretrial confinement because he was imprisoned on another sentence while he waited for trial. Additionally, he neither alleged nor showed any prejudice to his defense. In fact, the trial court acquitted him on the two most serious charges against him.¹

¶11 In summary, Parker incurred eight months of delay attributable to the State, none of which occurred after he asserted his speedy trial right. His pretrial incarceration was not extended and his defense was not impaired. On balance, Parker's constitutional rights were not violated by undue delay in trying him.

¶12 Parker's postconviction motion failed to raise any relevant factual disputes. Therefore, the trial court did not err when it denied Parker an evidentiary postconviction hearing. *See State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). Although Parker intended to use the hearing to show that the delay attributable to him was caused by counsel's negligence, that question was not relevant to the speedy trial analysis. Even if Parker established counsel's negligence, any subsequent delay caused by it is not attributable to the State, which played no part in Parker's disputes with his attorney.

¹ Parker received acquittals on counts charging burglary while armed, kidnapping while armed, and contributing to the delinquency of a juvenile.

By the Court.—Judgment and order affirmed.

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

