COURT OF APPEALS
DECISION
DATED AND FILED

April 3, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0545-CR **Cir. Ct. No. 94CF943070**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROGER P. BARBER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Judgment affirmed in part, reversed in part; order reversed and cause remanded.*

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

¶1 PER CURIAM. Roger Barber appeals a judgment convicting him, after retrial, of burglary of a building or dwelling by use of a dangerous weapon. He also appeals an order denying his postconviction motion for sentence modification. Barber contends that he was entitled to have the case dismissed

because the State waited over a year to pursue a new trial following remand from this court, that a substitute witness should have been barred from testifying, and that the trial court erroneously exercised its discretion by increasing his sentence after the new trial. We conclude that there was no statutory or constitutional speedy trial violation and that the trial court properly allowed the substitute witness to testify. However, because the State concedes that the trial court failed to cite sufficient justification for increasing Barber's sentence, we remand for the limited purpose of resentencing.

BACKGROUND

¶2 This court previously overturned Barber's conviction on two counts of burglary. ***State v. Barber***, Nos. 97-3778-CR and 97-3780-CR, unpublished slip op. (Wis. Ct. App. Feb. 23, 1999). One of the issues on that appeal was whether the two charges could properly be tried together. Although this court concluded that another issue was dispositive of the appeal, we chose to address the severance issue because it "may recur if the State pursues a retrial." ***Id***. at 2. The record was remitted to the circuit court on June 8, 1999. No further action was taken, however, until an assistant district attorney contacted the court on January 10, 2001, to inquire about the status of the case. The case then proceeded to trial, over Barber's objection.

¶3 On the first day of trial, the State informed the court that one of its fingerprint experts had retired "years ago," but that another lab technician was prepared to testify in his place. The defense moved to exclude the technician's testimony, but the trial court denied the motion on the grounds that the testimony would be substantially similar to that offered at the prior trial.

¶4 Barber was convicted of armed burglary and sentenced to thirty-eight years in prison. Unlike Barber's prior forty-year sentence, this sentence was imposed consecutive to any other sentence. Barber's motion for sentence modification was also denied.

DISCUSSION

Trial Delay

¶5 Barber first asserts that this case should have been dismissed under WIS. STAT. § 808.08(3) (2001-02)[1] because the State failed to make a motion for further proceedings in the trial court within one year after the record had been remitted. He contends that § 808.08 applies to his case by virtue of WIS. STAT. § 972.11(1), which provides, in relevant part, that "the rules of evidence and practice in civil actions shall be applicable in all criminal proceedings unless the context of a section or rule manifestly requires a different construction."

¶6 The State does not contest the applicability of WIS. STAT. § 808.08 to criminal cases, but argues that the facts here fall within § 808.08(2), rather than subsec. (3). Because we agree that the one-year time limit of § 808.08(3) does not apply to the circumstances here, we do not address whether § 808.08 applies to criminal cases.

¶7 WISCONSIN STAT. § 808.08(2) provides that "[i]f a new trial is ordered, the trial court, upon receipt of the remitted record, shall place the matter on the trial calendar."

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶8 Barber maintains that WIS. STAT. § 808.08(2) does not apply here because this court did not explicitly order a new trial in our previous opinion, but simply reversed. He argues that the outright reversal in the mandate line, along with the statement that the severance issue "may recur if the State pursues a retrial," gave the State a choice about whether to dismiss the charges, negotiate a settlement, or pursue a new trial. We are not persuaded, however, that the State would have been barred from any of those options even if a new trial had been explicitly ordered. Furthermore, the appellate opinion also expressly noted that "Barber's right against double jeopardy would not be violated by a retrial." ***Barber***, unpublished slip op. at 12 n.6. Given that statement, and the fact that one of the orders reversed was an order denying a motion for a new trial, we conclude that the only reasonable interpretation of the opinion was that the matter was being remanded for a new trial, or trials, at the State's discretion. If § 808.08 applies at all to criminal proceedings, § 808.08(2) would be the applicable subsection here.

¶9 Barber next argues that the one-year limitation in WIS. STAT. § 808.08(3) should logically extend to subsec. (2) as well. However, § 808.08(2) already has its own temporal provision, specifying that the trial court shall schedule a new trial "upon receipt of the remitted record." Unlike § 808.08(3), subsec. (2) does not specify any penalty if the scheduling fails to occur immediately "upon receipt." While this may be a legislative oversight, we cannot conclude that the statute mandates dismissal in these circumstances.

¶10 Barber further asserts that the failure to hold his new trial within a year after remittitur violated his constitutional right to a speedy trial. U.S. CONST. amend. VI; WIS. CONST. art. I, § 7. The factors for evaluating an alleged speedy trial violation are: (1) the length of the delay; (2) the reason for the delay; (3) the

defendant's assertion of his right; and (4) prejudice to the defendant. ***Barker v. Wingo***, 407 U.S. 514, 530 (1972).

¶11 Although the length of the delay and the fact that it was attributable to the State's oversight weigh in favor of finding a violation, we conclude that the first two factors are outweighed in these circumstances by the last two. The reversal of Barber's conviction, without the dismissal of the complaint or the attachment of jeopardy, left the charges against him still pending. Yet Barber concedes that he never requested a speedy trial. With regard to prejudice, Barber was already in jail on another sentence. If he was experiencing anxiety over having the burglary charges continuing to hang over him, he could at the very least have made some inquiry as to the status of the case. He did not. Nor has he shown that his ability to defend the matter was in any way impaired by the delay. To the contrary, the jury found in Barber's favor on one of the two charges at the new trial. We conclude that there was no speedy trial violation.

Substitute Witness

¶12 The State does not dispute that it violated a discovery statute by failing to disclose the name of its substitute witness until the day of trial. It argues that the trial court's refusal to exclude the witness was nonetheless a proper exercise of discretion because Barber could not show that he was prejudiced by the substitution.

¶13 There is a two-step process for imposing sanctions for a discovery violation under WIS. STAT. § 971.23(7m). First, the court must determine whether the noncomplying party has shown good cause for the noncompliance. In the absence of "good cause," exclusion of the evidence is mandatory. ***State v. DeLao***, 2002 WI 49, ¶51, 252 Wis. 2d 289, 643 N.W.2d 480. Second, "if the

[noncomplying party] can show good cause for its failure to disclose, the circuit court may exclude the evidence or may grant other relief such as a recess or continuance." ***Id***.

¶14 The trial court here found that the State had good cause for not providing the name of the substitute witness because the State did not know which person the lab would send to testify. Moreover, because the State did give notice that someone from the lab other than the original witness would be testifying, and because the testimony offered was substantially the same as the trial testimony of the original witness, the trial court determined that exclusion was not necessary. The trial court's analysis shows a proper exercise of discretion. Furthermore, Barber has not shown that he was prejudiced by the substitution of the expert witness.

Sentence Modification

¶15 A trial court cannot impose a greater sentence when resentencing a defendant unless "'events occur or come to the sentencing court's attention subsequent to the first imposition of sentence which warrant an increased penalty.'" ***State v. Church***, 2002 WI App 212, ¶19, 257 Wis. 2d 442, 650 N.W.2d 873 (quoting ***State v. Leonard***, 39 Wis. 2d 461, 473, 159 N.W.2d 577 (1968)), *review granted*, 2002 WI 121, 257 Wis. 2d 116, 653 N.W.2d 888 (No. 01-3100). The State concedes that the trial court here failed to identify any new factors which justified an increased penalty. We therefore remand for resentencing.

By the Court.—Judgment affirmed in part, reversed in part; order reversed and cause remanded.

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