COURT OF APPEALS
DECISION
DATED AND FILED

December 19, 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. 02-1237-CR **Cir. Ct. No. 01-CT-474**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DENNIS R. HYLAND,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed.*

¶1 VERGERONT, P.J.[1] Dennis Hyland appeals the judgment of conviction for operating a motor vehicle (OWI) while under the influence of an intoxicant, third offense, contrary to WIS. STAT. § 346.63(1)(a). He contends the trial court erroneously denied his motion to dismiss the charge on the ground that

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f)(1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

his Sixth Amendment right to a speedy trial was violated. Although our analysis differs somewhat from that of the trial court, we conclude Hyland's Sixth Amendment right to a speedy trial was not violated, and we therefore affirm.

¶2 The relevant facts are not disputed. On October 30, 1999, Hyland was issued a civil citation in Dane County for OWI, first offense, for an incident occurring on that date. At that time there were two other charges of OWI, first offense, pending against him, one in Dodge County and one in Columbia County. He was convicted of the Columbia County offense on February 1, 2000. The Dane County charge was dismissed, apparently on March 1, 2000.[2] The record contains a copy of a document entitled "Stipulation & Order," which apparently refers to that dismissal. It is signed on behalf of the State, but not on behalf of or by Hyland, and contains the notation "The State will be re-issuing as a criminal offense."

¶3 On March 5, 2001, the State filed a criminal complaint against Hyland in Dane County Circuit Court charging OWI, second offense, for the October 30, 1999 incident and alleging the Columbia County conviction as the prior conviction. On March 22, 2001, Hyland moved for dismissal of the complaint on the ground that the delay in excess of one year violated his Sixth Amendment right to a speedy trial. He asserted that his right to a speedy trial began to run on February 1, 2000, because with the Columbia County conviction on that date, the civil charge against him in Dane County was converted to a criminal charge—OWI, second offense.

[2] Both Hyland and the State assert this occurred on March 1, 2000, although we are unable to find support in the record for this date.

¶4 The trial court denied the motion after a hearing on October 2, 2001. The court determined that from October 2000 until the criminal complaint was filed on March 5, 2001, the delay was attributable to the State because the State had not justified that time lapse; and the time from the date on which the motion was filed until the hearing was not attributable to the State, but was the ordinary processing time for a motion when a need for a more expeditious schedule was not brought to the court's attention. The court also determined there was no particularized showing of prejudice in terms of ability to present a defense. The court therefore concluded that Hyland's Sixth Amendment right to a speedy trial had not been violated.

¶5 On appeal Hyland renews in his first brief the argument that his right to a speedy trial under the Sixth Amendment attached on February 1, 2000. He contends that the court erred in not attributing to the State the delay from February 1 to October 2000, and that a delay from February 1, 2000, to the filing of the criminal complaint on March 5, 2001, is presumptively prejudicial. Therefore, he asserts, under the factors established by the supreme court in ***Barker v. Wingo***, 407 U.S. 514, 530 (1972),[3] there was a violation of his Sixth Amendment right to a speedy trial. The State responds there was no violation of Hyland's Sixth Amendment right to a speedy trial because that right did not attach until the criminal complaint was filed on March 5, 2001. We agree with the State's analysis.

[3] The Court in ***Barker v. Wingo***, 407 U.S. 514, 530 (1972), identified four factors that are to be considered when determining whether a defendant has been deprived of the Sixth Amendment right to a speedy trial: (1) the length of the delay; (2) the reason for the delay; (3) the assertion, if any, by the defendant for a speedy trial; and (4) the prejudice to the defendant.

¶6 The Sixth Amendment right to a speedy trial does not apply to the period before a defendant is "indicted, arrested, or otherwise officially accused." ***State v. Borhegyi***, 222 Wis. 2d 506, 510-11, 588 N.W.2d 89 (Ct. App. 1998), *citing* ***United States v. MacDonald***, 456 U.S. 1, 6 (1982). Generally, in the absence of an arrest or an indictment, an individual becomes officially or formally accused when a complaint and warrant are issued. *See* ***State v. Lemay***, 155 Wis. 2d 202, 209, 455 N.W.2d 233 (1990). In his reply brief, Hyland shifts his position somewhat and argues that when the State dismissed the civil charge on March 1, 2000, noting that "the State would be re-issuing as a criminal offense," Hyland formally became the accused at that time for purposes of his Sixth Amendment right to a speedy trial. However, he provides no authority for this position, and the Court in ***MacDonald*** rejected a similar argument.

¶7 In ***MacDonald***, the defendant had been a captain in the Army Medical Corp and was charged by the army with three murders. Those charges were dismissed in October 1970. 456 U.S. at 4, 5. In January 1975, a grand jury returned an indictment charging the defendant with those three murders. The Court held that, because the Sixth Amendment right to a speedy trial does not attach until a defendant is indicted, arrested, or otherwise officially accused, the speedy trial guarantee was no longer applicable to the defendant once the military charges were dismissed. ***Id.*** at 8. The Court rejected the argument that criminal charges were pending against the defendant during the entire time between his military arrest and the later indictment on civilian charges, concluding that during that period, the defendant was not under arrest, was not in custody, and was not subject to criminal prosecution. ***Id.*** at 10. Any undue delay after the military charges were dismissed, the Court stated, was subject to the protection of the Due Process Clause, not the Speedy Trial Clause. ***Id.*** at 7. Under the Due Process

Clause, the defendant must demonstrate that "the State deliberately delayed filing charges to obtain a tactical advantage over him and that this delay caused actual prejudice in presenting his defense." ***State v. Monarch***, 230 Wis. 2d 542, 551, 602 N.W.2d 179 (Ct. App. 1999). Hyland is not contending that this standard is met with respect to the delay in filing the criminal complaint.

¶8 We conclude that under ***MacDonald***, Hyland's right to a speedy trial under the Sixth Amendment did not attach until the criminal complaint was filed on March 5, 2001. Hyland does not argue that, if his right to a speedy trial first attaches on that date, the right was violated. Accordingly, we conclude the trial court correctly denied his motion to dismiss based on a violation of his Sixth Amendment right to a speedy trial.

By the Court.—Judgment affirmed.

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