COURT OF APPEALS
DECISION
DATED AND FILED

January 12, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1057-CR **Cir. Ct. No. 2006CT1010**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

DANIEL W. KOHEL,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.[1] This case returns to us after remand.[2] The State appeals from a circuit court order dismissing charges filed against Daniel W. Kohel for operating a motor vehicle while intoxicated (OWI) and with a prohibited blood alcohol content (PAC), both as a third offense. The circuit court did so based on its determination that the State had violated Kohel's due process rights by failing to produce potentially exculpatory evidence. We uphold the circuit court's ruling. Based on the facts as found by the circuit court, we conclude that the State's failure to produce potentially exculpatory evidence over a period of three and one-half years violated Kohel's due process rights. We therefore affirm the order.

FACTS

¶2 Kohel was charged with OWI and PAC, third offense, on July 19, 2006. The facts underlying the issue on appeal are not in dispute and were set forth in detail in the circuit court's decision.

> Kohel was arrested on June 23, 2006. Criminal charges were issued by the Racine County District Attorney on July 19, 2006.
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> On July 31, 2006, the defendant served upon the plaintiff a Demand for Discovery and Inspection. Paragraph 1 and Paragraph 2 of that demand specifically request the plaintiff produce for inspection:
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> "1. A copy of any written, recorded or videotaped statements made by the defendant concerning the alleged

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] *See* ***State v. Kohel***, No. 2008AP2486-CR, unpublished slip op. (WI App June 10, 2009).

offense which are within the possession, custody, or control of the plaintiff or its agents.

2. A copy of any videotape of the defendant concerning the alleged offense, which are within the possession, custody, or control of the plaintiff or its agents."

Kohel received no response to the Demand for Discovery and Inspection.

Kohel also sent an open record request for any video recording of Kohel's driving, arrest, booking, or breath test directly to the Wind Point Police Department. Kohel received no response to this request.

On January 9, 2008, all parties appeared for jury trial …. While in court, the arresting officer, Wind Point Police Officer Shulman, informed the court that a video recording of Kohel's driving, stop and arrest did, in fact, exist. As a result of this disclosure, the trial was adjourned.

On January 25, 2008, the defense wrote a letter to Racine County Assistant District Attorney [ADA] Jeremy Arn requesting a copy of the video recording. Racine County [ADA] Ryan Wetzsteon responded on February 11, 2008, stating that DVDs were received from the Wind Point Police Department; however, the DVDs were blank. Attorney Wetzsteon stated he would contact the defense when new DVDs were received (the original format of the recording was VHS, a fact learned after the matter was remanded by the court of appeals).

On March 13, 2008, the defense received a VHS copy of the video of Kohel's arrest; however, the video cassette was incomplete. The video was one minute and forty-nine seconds in its entirety. The video omitted Kohel's driving and abruptly ended with a preliminary breath test. The video was truncated in both the beginning and end portions, failing to show Kohel's driving and his arrest.

On March 31, 2008, the defense wrote a letter to Racine County [ADA] Jeremy Arn requesting confirmation or denial that a complete video recording of Kohel's stop and arrest existed. No response was received.

On June 23, 2008, the defense wrote a letter to Racine County [ADA] Matthew Hastings requesting confirmation or denial that a complete recording of Kohel's stop and arrest existed. On June 24, 2008 at 2:39 p.m. an assistant to Kohel's counsel attempted to contact [ADA] Hastings to

> follow up on the letter written the previous day. The assistant was directed to [ADA] Arn's voicemail and left a message. No response was received by Kohel's attorney.
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> On August 11, 2008, Kohel's attorney spoke by telephone to [ADA] Marc Christopher. Mr. Christopher indicated that he would investigate the matter.
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> On August 13, 2008, a hearing was held before the trial court, as a second jury trial date was scheduled the next week. At that time Kohel's attorney, yet again, reiterated his demand to be provided with a full and complete copy of the video recording. However, on that date, Kohel refrained from asking for more extraordinary relief, in the hope that there would be a resolution of the discovery issue.
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> Although the district attorney had at one time been provided with a duplicate compact disc apparently containing the recording in digital format, that duplicate disc was apparently lost. The state indicated, however, that it would be able to obtain the recording within "a day or so" and the matter was [adjourned] for resolution of the discovery issue.
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> On August 15, 2008, another hearing was held on the issue of the missing video recording. At that time the state advised the court that the original video recording was lost.
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> Later that same day, on August 15, 2008, Kohel filed a Motion to Dismiss. The motion alleged that subsequent to a demand for the same, the State destroyed exculpatory evidence. The motion further asserted that continuation of the prosecution would violate rights guaranteed to the defendant by the 4th and 14th Amendments of the United States Constitution.
>
> On August 15, 2008, the court issued a written decision, granting Kohel's motion and dismissed the case with prejudice.

The State subsequently appealed the dismissal of the charges. In an unpublished decision dated June 10, 2009, this court reversed the circuit court's judgment and remanded for further fact finding as to the contents of the video recording and the conduct of the police officers in failing to preserve the video-recorded evidence. *See* ***State v. Kohel***, No. 2008AP2486-CR, unpublished slip op. ¶1 (WI App June

10, 2009) (citing ***State v. Greenwold***, 189 Wis. 2d 59, 67, 525 N.W.2d 294 (Ct. App. 1994) (a defendant's due process rights are violated if the police: (1) fail to preserve evidence that is apparently exculpatory or (2) acted in bad faith by failing to preserve evidence that is potentially exculpatory)).

¶3 The events on remand are again set forth in the circuit court's decision:

> After the remand from the court of appeals, following the several adjournments of the hearing in early December 2009, counsel for the defense was provided with a VHS tape purported to contain the complete video. That VHS tape, however, was defective and contained no useful images.
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> On February 5, 2010, immediately prior to the evidentiary hearing, counsel for the defense was given a complete video. This was the first time since the filing of the criminal complaint in July 2006 that a complete video had been disclosed to the defense.
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> Testimony at the February 5 motion hearing was received from Officer Chad Schulman of the Wind Point Police Department. Schulman established that he had recorded the incident on an analog VHS system at the time of the arrest. Schulman established that he had not mentioned the VHS recording in his report of the arrest and that the VHS recording had not been turned over to the District Attorney's office. Officer Schulman further denied any knowledge of the Defendant's public records request with regard to the situation. Schulman established he would be the officer responsible for providing copies of the VHS tape. Schulman acknowledged that on 9 January 2008, he first disclosed that a VHS tape existed. Schulman further testified he made subsequent copies for the District Attorney's office but was unaware of what happened to those copies.
>
> Schulman testified that during August of 2008 he received a call from the chief of the Wind Point Police Department, David C. Rossman, indicating that Rossman was looking for the original VHS tape and Rossman could not find it.

> Chief Rossman corroborated Schulman's testimony and indicated that the original had been found within the last few months (late 2009 or early 2010) in the police department office in a box of video tapes.

Following briefing, the circuit court issued a written decision, the fact portion of which is laid out above. In addressing the fact that a complete copy of the video recording, long unavailable, was now in possession of the defense prior to the hearing on remand, the court shifted its inquiry to the second prong of ***Greenwold***: whether the officers knew of the usefulness of the evidence and whether the officers acted with official animus or made a conscious effort to suppress potentially exculpatory evidence. *See* ***Greenwold***, 189 Wis. 2d at 67, 69.

¶4 Recognizing that negligence does not constitute bad faith for the purpose of a due process violation, *see* ***id.*** at 68, the circuit court then framed the issue as "whether the acts of the … officer for the period of time involved could be construed as negligence, or were the acts of such a failure to perform duties that it is in fact bad faith and an effort or lack of effort to produce evidence upon demand." The circuit court noted the defense's demand for evidence and also the "lack of response to the request for records made under the open records procedure," stating that "[t]he combination of failure to produce evidence in court or on the civil request amplifies the agency's disregard for law and procedures."

> The officer's professed lack of reasonable police procedures in producing evidence, preserving evidence for easy or manageable discovery and the lack of providing the evidence in a usable format combined for the Court to conclude that the activity and failure of the evidence to be produced must be construed as animus as presenting an absolute unfriendly spirit to comply with legitimate discovery demands.

Finally, in making its determination that Kohel suffered a violation of his due process rights, the circuit court recounted in detail the delay in discovery:

> This matter was set for trial three times over a period of two years (June 2006 through August 2008). Then followed a period of appeal until June 2009. The tape was produced in February 2010. This is an unreasonable period of time to produce discovery in a case of this nature and considering the evidence was easily producible from the beginning.
>
> Due process embraces a concept of prompt attention to the matter; substantial due process. Kohel has a right to prompt disposition; and prompt disposition in this case turns on the facts….
>
> The continuances in this case are all due to the Village of Wind Point failing to produce easily accessible evidence.
>
> In balancing the public's interest in this matter against the defendant's right to a prompt trial, the Court should try to strike a balance for the efficient administration of justice. In this respect the court … concludes that [Kohel's] right to prompt and fair justice has been denied.

¶5 The circuit court dismissed the charges against Kohel with prejudice. The State appeals.

DISCUSSION

¶6 We begin by addressing the State's production of the requested video recording on remand. In an effort to comply with our direction on remand to hold a fact-finding hearing consistent with ***Greenwold***, the circuit court's decision addressed the nature of the evidence and officer conduct. However, the court's due process analysis shifted from the failure to produce evidence to the failure to produce evidence in a timely manner. On appeal, the State challenges the circuit court's finding that the police officers' failure to adequately respond to Kohel's discovery requests over the two-year period prior to the third scheduled trial was tantamount to animus or bad faith. In doing so, the State argues that the issue is moot under ***Greenwold*** because the exculpatory evidence was found prior to the remand hearing in February 2010, and also that the failure to respond to

Kohel's discovery request was the result of negligence and not withheld in bad faith. The State's argument fails to address the crux of the circuit court's concern, namely the State's lack of procedure for preserving and producing evidence, the amount of time passed before the State finally produced the video recording that was undisputedly in its possession the entire time. In light of the State's production of the video recording following remand, we follow the circuit court's lead and address Kohel's due process claim in terms of timeliness.[3]

¶7 The constitutional right to due process as found in the Sixth Amendment to the United States Constitution and article I, section 7 of the Wisconsin Constitution guarantees a speedy trial. A defendant's constitutional right to a speedy trial is based on a "totality of circumstances that exist in any specific case" and should be determined on an ad hoc balancing basis. ***State v. Borhegyi***, 222 Wis. 2d 506, 509, 588 N.W.2d 89 (Ct. App. 1998); ***Barker v. Wingo***, 407 U.S. 514, 530 (1972). This right is triggered with the initial step of the criminal prosecution, be it the arrest, ***Borhegyi***, 222 Wis. 2d at 511, or the filing of the complaint and warrant, ***State v. Lemay***, 155 Wis. 2d 202, 210, 455 N.W.2d 233 (1990). Whether Kohel has been denied his constitutional right to a speedy trial presents a question of law which we review de novo; however, we accept the circuit court's findings of fact unless clearly erroneous. *See* ***State v. Leighton***, 2000 WI App 156, ¶5, 237 Wis. 2d 709, 616 N.W.2d 126.

[3] As noted earlier, the parties dispute whether, given the State's production of the video recording prior to the 2010 remand hearing, the circuit court should have applied the analysis set forth in ***State v. Greenwold***, 189 Wis. 2d 59, 525 N.W.2d 294 (Ct. App. 1994). However, despite the parties' focus on ***Greenwold*** at the remand hearing, the ***Greenwold*** inquiry nevertheless elicited the information and testimony pertinent to an alleged speedy trial violation.

¶8 In balancing a defendant's right to speedy trial, the court examines the following factors: (1) length of the delay, (2) reasons for the delay, (3) the defendant's assertion of his or her right to speedy trial, and (4) prejudice to the defendant. ***Borhegyi***, 222 Wis. 2d at 509 (citing ***Barker***, 407 U.S. at 530). None of these factors is regarded "as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." ***State v. Ziegenhagen***, 73 Wis. 2d 656, 665, 245 N.W. 2d 656 (1976) (quoting ***Barker***, 407 U.S. at 533). "Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." ***Id.***

¶9 Turning to the first factor, the length of delay, the record reflects that Kohel was arrested on June 23, 2006, and a criminal complaint was filed on July 19, 2006. To date, Kohel's case has not gone to trial, although trials were scheduled for November 2, 2006, January 9, 2008, and August 20, 2008. When the length of delay approaches one year, it is generally considered presumptively prejudicial, ***Borhegyi***, 222 Wis. 2d at 510, thus triggering inquiry into the remaining three factors. Here, the length of delay in Kohel's case, as noted by the circuit court, was two years from arrest to the initial appeal (June 2006 to August 2008), followed by a period of appeal until June 2009. This was followed by a postremand hearing on February 5, 2010, at which the State produced the complete video recording. Even limiting our inquiry to the period between charging and the initial appeal, the length of delay in this case meets the threshold of presumptively prejudicial. We therefore turn to the reasons for the delay.

¶10 The record reflects that the first trial date was November 2, 2006, approximately five months after Kohel's arrest. Kohel's counsel requested an

adjournment due to the unavailability of a defense witness. The parties then proceeded to prepare for the rescheduled trial set for January 9, 2008. The record does not indicate the cause for the approximate fourteen-month delay in rescheduling the trial date. Nevertheless, when the parties appeared in court on January 9, 2008, Officer Schulman raised the issue of the video recording for the first time. All subsequent delays from January 9, 2008, until the Wind Point police department produced the video recording on February 5, 2010, are attributable to the State.[4] Notably, not only was the trial adjourned two times, the State took an appeal contending that the original video recording was lost. And, after remand, the State did not produce a complete video recording until after the matter was back before the circuit court for over six months, and then only immediately prior to the remand hearing.

¶11 Turning to the second factor, the reason for the delay, the State was given the opportunity at the postremand hearing to explain the circumstances surrounding the production of the video recording, but did not do so. *See* ***State v. Williams***, 2004 WI App 56, ¶34, 270 Wis. 2d 761, 677 N.W.2d 691 ("[I]f the State cannot justify the delay, then that period must be considered in deciding the issue of lack of a speedy trial."). Instead, the State maintained that the video recording was misplaced or there were excusable difficulties in duplicating it. Likewise, the State asserts on appeal that the "unfortunate delay in providing a viable copy of the tape was the result of correctable error and technical difficulties." However,

[4] We base this on the fact that the State's failure to produce the video recording resulted in the ongoing litigation—appeal and remand hearing—following the January 9, 2008 hearing. We acknowledge that within this time period there was at least one delay also attributable to the circuit court—the rescheduled March 30, 2010 status conference to June 28, 2010, due to the judge not being present at the scheduled hearing.

this does little to explain why defense counsel received no response to inquiries about the video recording or why the police department lacked reasonable procedures by which the recording, which was in its possession the entire time, would be inventoried, stored, and disclosed. Based on the testimony as to where the video recording was found, the circuit court found that the evidence had been "easily accessible" and "easily producible from the beginning." Yet the State provided no explanation as to why it had not conducted a thorough search for the video recording at any point prior to the filing of its first appeal. This court has previously stated that the State's failure to offer an explanation for a substantial delay "exceeds negligence and evinces a cavalier disregard" of a defendant's speedy trial right. ***Borhegyi***, 222 Wis. 2d at 513. "Cavalier disregard toward a defendant's right to a speedy trial is an element of delay that is to be weighed most heavily against the State." ***Id.***

¶12 As to the third factor, Kohel did not expressly assert his right to a speedy trial. However, in ***Hadley v. State***, 66 Wis. 2d 350, 361, 225 N.W.2d 461 (1975), our supreme court indicated that this factor only concerns cases in which a defendant is "consciously seeking to avoid the day of reckoning." Indeed, a defendant has no duty to bring himself or herself to trial; it is the State's duty to do so. ***State v. Urdahl***, 2005 WI App 191, ¶33, 286 Wis. 2d 476, 704 N.W.2d 324. Here, the undisputed facts as set forth in the circuit court's decision indicate that Kohel doggedly pursued the video-recorded evidence from the date of the January 9, 2008 trial adjournment until the circuit court's dismissal of the charges on August 15, 2008. Despite Kohel's repeated requests for information, the State failed to respond to Kohel on more than one occasion (letting one month or even five months go by without acknowledging Kohel's request), and provided blank, incomplete and defective copies.

¶13 Also relevant to the third factor, we observe that Kohel's August 11, 2008 motion to dismiss the charges, while premised on the State's failure to disclose exculpatory evidence, references his due process rights generally. Kohel's March 18, 2010 brief in support of that motion on remand alleges that the failure to timely disclose material evidence "wrought a tremendous hardship upon Kohel" and subjected him to "onerous and protracted litigation." Kohel's counsel prefaced the remand hearing by stating his belief that a determination should be made "as to why [the] evidence was lost for going on four years" and why it had taken until the morning of the remand hearing "to actually see the evidence [he] requested in 2006."[5] Again, although not expressly raised by Kohel, his due process concerns regarding timeliness become apparent in the record following the August 2008 adjournment. Given that Kohel consistently pursued evidence that would have moved his case to trial, we do not weigh his failure to assert his right to a speedy trial against him.

¶14 Finally, we turn to the fourth factor that addresses any prejudice to Kohel from the constitutional speedy trial delay. In assessing prejudice, we consider three interests: (1) prevention of oppressive pretrial incarceration, (2) prevention of anxiety and concern by the accused, and (3) prevention of impairment of the defense. ***Urdahl***, 286 Wis. 2d 476, ¶34. Because Kohel was not incarcerated during the pendency of these proceedings, we need not address the first interest. As to the second and third interests, there is no evidence other than statements made by Kohel's counsel as to Kohel's anxiety or impairment of

[5] The record reflects that Kohel's counsel was actually provided with a nonworking copy of the complete recording two months prior to the remand hearing. However, Kohel's counsel did not inform the State of the problem until the morning of the remand hearing.

the defense. However, Kohel need not show prejudice in fact to demonstrate a speedy trial violation. *See* ***Hadley***, 66 Wis. 2d at 364 ("no burden is placed upon the defendant to show he was prejudiced in fact"). Indeed, where the length of the delay is excessive and the reason for the delay lies solely with the State, prejudice can exist as a matter of law. *See* ***id.*** Here, after winding through the procedural history of this case and Kohel's failed efforts to obtain a complete copy of the video recording, the circuit court's decision ultimately addresses due process in terms of timeliness, the "efficient administration of justice" and the defendant's "right to prompt and fair justice." The court determined that Kohel had been denied his due process rights. For the reasons set forth above, we agree.

CONCLUSION

¶15 We uphold the circuit court's March 31, 2010 dismissal of the charges against Kohel with prejudice. While the circuit court did so based on its finding that the Wind Point police department's delay in providing easily accessible material evidence to the defense was tantamount to official animus, we do so on the basis of Kohel's right to a speedy trial. *See* ***State v. Trecroci***, 2001 WI App 126, ¶45, 246 Wis. 2d 261, 630 N.W.2d 555 ("We are entitled to affirm a trial court's ruling on different grounds if the effect of our holding is to uphold the trial court's ruling."). Regardless of the label, the State's conduct during the course of prosecuting this case resulted in a violation of Kohel's due process rights, the remedy for which is the dismissal of the charges against him. We affirm.

By the Court.—Order affirmed.

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