

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 4, 2003

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. 03-0751-CR
STATE OF WISCONSIN**

Cir. Ct. No. 92CF001862

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD C. BRANDAU,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Affirmed.*

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

¶1 PER CURIAM. Edward Brandau appeals a judgment convicting him of burglary, and an order denying postconviction relief. The dispositive issue is whether delays in the prosecution violated Brandau's constitutional right to a speedy trial. We conclude that there was no violation of this right, and therefore affirm.

¶2 Brandau committed a burglary in Dane County in July 1992. A few weeks later he was arrested in Dubuque, Iowa, under an alias. After confirming that the arrested person was Brandau, Dane County issued a burglary complaint against him in December 1992.

¶3 In January 1993, Wisconsin sought Brandau's extradition from Iowa on a parole violation. Later that month he was convicted and sentenced to prison in an Iowa felony prosecution. He also waived extradition to Wisconsin. In August 1993, Wisconsin dropped its efforts to extradite Brandau for the parole violation.

¶4 In 1994, Brandau was transferred to Kentucky to face criminal charges there. Six weeks later he returned to Iowa after the Kentucky court dismissed that charge. In July 1994, Outagamie County filed a detainer on Brandau, and in October 1994, Iowa transferred him to Outagamie County. In February 1995, the Outagamie County circuit court convicted Brandau on several felony charges, and sentenced him to seventy-five years in prison. Brandau then returned to Iowa to serve out his Iowa sentence.

¶5 In June 1995, Brandau received a parole on his Iowa sentence, and returned to Wisconsin to begin serving his Outagamie County sentences. On September 1, 1995, with Brandau now serving his Wisconsin prison sentences, Dane County filed a detainer on him. On September 20, 1995, Brandau made his initial appearance in the Dane County prosecution. On that day, in order to obtain counsel, he asked the court to delay his preliminary hearing for at least thirty days. The court scheduled the preliminary hearing for October 24, 1995. However, the State failed to make the necessary arrangements to transfer Brandau from prison to the courtroom, and the court postponed the hearing until November 29, 1995. For

reasons that do not appear on the record, the preliminary hearing did not occur on that date and was rescheduled for January 1996.

¶6 In December 1995, Brandau asserted his right to a speedy trial. After a one week delay attributable to defense counsel, Brandau finally had his preliminary hearing on January 24, 1996. On March 26, 1996, the trial court denied his motion to dismiss on speedy trial grounds, and Brandau's jury trial ensued. The jury found him guilty, and the trial court sentenced him to a ten-year prison term, consecutive to his Outagamie sentences.

¶7 After a lengthy delay, which was not attributable to Brandau and which this court excused, he commenced a WIS. STAT. RULE 809.30 (2001-02)¹ postconviction proceeding in August 2002. He raised the speedy trial issue, and alleged that trial counsel ineffectively litigated that issue. This appeal results from the trial court's order denying relief on that motion.

¶8 Whether a defendant's constitutional speedy trial right has been violated is a question this court reviews de novo. See *State v. Ziegenhagen*, 73 Wis. 2d 656, 664, 245 N.W.2d 656 (1976). This court will, however, uphold the trial court's findings of historical facts unless they are clearly erroneous. See WIS. STAT. § 805.17(2); *State v. Clappes*, 136 Wis. 2d 222, 235, 401 N.W.2d 759 (1987). The factors bearing on the speedy trial analysis are: (1) the length of the delay between charging and trial; (2) whether the government or the defendant is more to blame for the delay; (3) whether the defendant asserted the right to a speedy trial; and (4) whether the delay prejudiced the defendant. See *Doggett v.*

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

United States, 505 U.S. 647, 651 (1992); *Day v. State*, 61 Wis. 2d 236, 244, 212 N.W.2d 489 (1973). Our task is to balance these factors to reach a just and proper result. See *Foster v. State*, 70 Wis. 2d 12, 16, 233 N.W.2d 411 (1975). In doing so, a deliberate delay counts more against the State than a more neutral reason, such as negligence. *Scarborough v. State*, 76 Wis. 2d 87, 96, 250 N.W.2d 354 (1977). Valid reasons for delay, such as a missing witness, do not weigh against the State. *Id.* We also exempt from consideration periods of time required for the orderly and proper disposition of the prosecution. See *id.* at 100-01. The first inquiry is always whether the delay has crossed the threshold dividing ordinary from presumptively prejudicial delay. *Hatcher v. State*, 83 Wis. 2d 559, 566-67, 266 N.W.2d 320 (1978). This question must be answered in the affirmative before inquiry can be made into the remaining factors. *Id.*

¶9 Here, the delay of thirty-nine months between charging and trial was undisputedly “presumptively prejudicial.” However, the reasons for that delay do not weigh heavily against the State. Dane County’s inaction between filing the complaint in December 1992, and filing the detainer against him in September 1995, caused the most delay. Nevertheless, that inaction was not a deliberate attempt to prejudice Brandau. Nor do we conclude that the county was negligent, at least until Brandau’s return to Wisconsin in June 1995. The appropriate Dane County personnel did not know where he was, and as a matter of routine procedures and priorities chose not to divert resources to locate him. The Dane County Sheriff’s extradition officer testified that, as of November 2002, Dane County had approximately 20,000 outstanding warrants and that this number did not differ appreciably during the time of Brandau’s incarceration in Iowa. Additionally, weighing in the State’s favor is the fact that Brandau knew of the

Dane County proceeding but never contacted Dane County about it. Under the circumstances, we place little weight on any delay through June 1995.

¶10 After Dane County filed its detainer in September 1995, the State was responsible for the delayed preliminary hearing. Again, however, there is no evidence of anything more than possible negligence on the State's part. Consequently, the State's role in causing a delay in prosecution does not establish a constitutional violation.

¶11 None of the remaining factors weigh in Brandau's favor. Brandau first asserted the right to a speedy trial in September 1995. He then withdrew the demand. He reasserted his right in December 1995, and received a trial three months later, within the 120-day statutory limit. Although Brandau points to earlier inquiries about a prompt resolution of the Dane County charge, none were directed to or received by Dane County.

¶12 Brandau also failed to demonstrate that the delay prejudiced him. Prejudice involves four considerations: oppressive pretrial incarceration; the defendant's anxiety and concern over unresolved charges; impairment of the defense; and the loss of an opportunity for concurrent sentences. *See Green v. State*, 75 Wis. 2d 631, 637, 250 N.W.2d 305 (1977). Here, Brandau suffered no pretrial incarceration as a result of this prosecution. He was imprisoned on other charges during its entire duration. He cannot reasonably contend that the pending charge caused him any measurable anxiety or concern. He testified that during this prosecution he faced forty-seven felony charges in several jurisdictions. Those included the far more serious charges for which he received seventy-five years in prison in Outagamie County. Additionally, he failed to show any prejudice to his defense from a delay. According to Brandau, he lost the

opportunity to prove that he was working the night of the burglary. However, he testified at his trial that he was not working on weekends in July 1992, and the burglary occurred on a weekend. He also contends that he lost the opportunity to use his father as an alibi witness, because his father was dead by the time of the trial. However, his father died in July 1993, and it is unlikely Brandau could have been extradited to Wisconsin and tried by then even had Dane County promptly sought extradition. In any event, it is at best speculation that Brandau's father's testimony could have helped the defense, had he been willing and able to testify, because the physical evidence against Brandau was overwhelming. Finally, although Brandau lost the opportunity for a sentence concurrent with his Iowa sentence, he preserved the opportunity for a sentence concurrent to his Outagamie County sentences.

¶13 Our decision makes it unnecessary to address the State's argument that Brandau is precluded from pursuing his speedy trial claim in this case because of a similar claim made in his appeal of the Outagamie County conviction. Nor do we address his argument that trial counsel ineffectively represented him on the speedy trial issue. We have concluded as a matter of law that Brandau does not have a viable speedy trial claim. Therefore, it does not matter whether trial counsel effectively presented it.

By the Court.—Judgment and order affirmed.

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

