

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 27, 2004

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. 03-1589-CR

Cir. Ct. No. 02-CF000612

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

NICOLE M. SCHOEPKE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Marathon County:
VINCENT K. HOWARD, Judge. *Reversed.*

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

¶1 PER CURIAM. The State appeals the circuit court's order dismissing the charges against Nicole Schoepke. The issue is whether Schoepke's right to a speedy trial was violated. We conclude that it was not and reverse.

¶2 To determine whether a defendant’s constitutional right to a speedy trial has been violated, we consider a four-part balancing test: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted the right to a speedy trial; and (4) whether the defense was prejudiced by the delay. *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *State v. Borhegyi*, 222 Wis. 2d 506, 509, 588 N.W.2d 89 (Ct. App. 1998). “The right to a speedy trial, however, is not subject to bright-line determinations and must be considered based upon the totality of the circumstances that exist in any specific case.” *Borhegyi*, 222 Wis. 2d at 509. We review a defendant’s claim that he or she was denied the right to a speedy trial de novo. *Id.* at 508.

¶3 Schoepke was initially charged with one count of second-degree sexual assault of a child on May 21, 2001. The charge was dismissed without prejudice on October 29, 2002, at the State’s request. The State then refiled charges on October 30, 2002, this time alleging three counts of second-degree sexual assault of a child. Schoepke moved to dismiss on January 29, 2003, arguing that her right to a speedy trial had been violated.¹ The case was dismissed by the circuit court with prejudice on April 30, 2003.

¶4 When the State dismissed the initial charges and refiled the next day, it did so to avoid proceeding to trial without a witness. The State had moved for a continuance the day before trial, arguing that it needed to secure a witness, but the circuit court had denied the motion. Because the sole purpose of the dismissal and

¹ The motion was dated January 29, 2003, and sent to the circuit court with a letter on January 30, 2003. From the circuit court docket entries, however, it appears that the motion was not filed with the clerk of circuit court until March 27, 2003, after the hearing on the motion had been held.

refiling was to avoid the circuit court's order denying the request for a continuance, we will analyze the entire period—from the initial filing of charges in the first case to the dismissal of the second case with prejudice—as one continuous period for purposes of determining whether Schoepke's right to a speedy trial was violated.

¶5 There is no dispute that the *length* of the delay was presumptively prejudicial, but the *reason* for the delay undermines Schoepke's claim of a speedy trial violation. The delay prior to the trial date was largely attributable to Schoepke. After the charges were initially filed, Schoepke's attorney requested an informal pretrial conference prior to the initial appearance, waived the time limits for a preliminary hearing, asked that the preliminary hearing be rescheduled and then moved for substitution, all actions which caused substantial delay. In fact, Schoepke states in her brief that she was "content" with the delay up until the trial was scheduled, but argues that further delay after the trial was scheduled was not acceptable to her. However, only three months passed between the trial date and the date Schoepke moved to dismiss for a speedy trial violation. Although this delay is entirely attributable to the State, it is not a long delay.

¶6 Turning to the third factor of the balancing test, Schoepke never asserted the right to a speedy trial until she moved to dismiss for a speedy trial violation, which militates against her claim. Finally, Schoepke has not shown that her defense was significantly prejudiced. While it is true that defense counsel needlessly spent time preparing for trial, Schoepke's defense was not otherwise impaired by the passage of time. Considering the four factors of the test as a whole, the balance tips against Schoepke's claim. Only the length of time between the initial charges and the dismissal with prejudice supports her claim of

a speedy trial violation, but that is insufficient to overcome the other factors. Therefore, we conclude that Schoepke's right to a speedy trial was not violated.

¶7 Schoepke contends that she was prejudiced because the State added two additional counts when it refiled charges. We, too, are troubled by the prosecutor's actions. The prosecutor's conduct may appear vindictive because the prosecutor had been prepared to proceed to trial on one count just a day earlier, and no new circumstances existed when the two additional charges were added, except the circuit court's order denying the motion for a continuance and the subsequent dismissal. Although we have concluded that Schoepke's right to a speedy trial was not violated, the prosecutor's actions may be the basis of a separate due process argument or other claim, which Schoepke may assert in the circuit court on remand.² Our decision does not limit the circuit court from dismissing some or all of the charges on remand on other grounds.

By the Court.—Order reversed.

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

² Schoepke briefly argued that her right to due process was violated in the circuit court, but that argument was tied to her speedy trial claim and did not focus specifically on the prosecutor's decision to charge two additional counts.

