COURT OF APPEALS
DECISION
DATED AND FILED

June 22, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1048-CR **Cir. Ct. No. 2007CF178**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRAVIS HEBERT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: TERENCE T. BOURKE, Judge. *Affirmed.*

Before Neubauer, P.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. Travis Hebert has appealed from a judgment convicting him after a jury trial of two counts of delivery of cocaine in violation of

WIS. STAT. § 961.41(1)(cm)1r. (2009-10).[1] One of the counts was enhanced as provided in WIS. STAT. § 961.49(1m)(b)6. because it occurred within 1000 feet of a school. We affirm the judgment of conviction.

¶2 Hebert's convictions were based on drug sales that occurred on December 5, 2006, and January 29, 2007. The sales involved controlled purchases by Felipe Martinez, who was working with the Sheboygan County Multi-Jurisdictional Enforcement Group (MEG) as a confidential informant at the time. Martinez testified at trial and identified Hebert as the person who sold him cocaine on December 5, 2006, and January 29, 2007. Gerald Brachmann, the police officer who monitored the wire worn by Martinez at the time of the sales, also testified, as did the officers who conducted surveillance at the time of the sales.

¶3 The audio recording of a phone call made by Martinez to Hebert on December 5, 2006, was played at trial, as was a recording of a phone call made by him to Hebert on January 29, 2007. In addition, the recordings of the transmissions from the wires worn by Martinez at the time of the two sales were played at trial. The recording of the wire transmission from December 5, 2006, included a second phone call made by Martinez to Hebert as he waited for Hebert to arrive. The recording of the wire transmission from January 29, 2007, included

[1] All references to the Wisconsin Statutes are to the 2009-10 version.

two phone calls made by Martinez to Hebert as he waited for Hebert.[2] Video recordings made by one of the surveillance officers on December 5, 2006, and January 29, 2007, were also played for the jury. The videos depicted the scene at the corner of 12th Street and Union Avenue in the city of Sheboygan where the meetings between Martinez and Hebert occurred and depicted Martinez entering Hebert's vehicle, where Martinez indicated that the exchange of drugs and money occurred.[3] The video of the January 29, 2007, incident also included footage of Hebert's vehicle being driven to Hebert's apartment so that Hebert could obtain the drugs to complete the sale.

¶4 At trial, testimony was also presented regarding the number of times Martinez had been convicted of crimes and the consideration he received in exchange for his assistance to the police in this case. A DEFERRED CONVICTION AGREEMENT (DCA) signed by Martinez and the assistant district attorney on February 2, 2007, setting forth an agreement to suspend the entry of judgment against him in another criminal case, was admitted into evidence.

¶5 The first issue raised by Hebert on appeal is whether the prosecutor violated his discovery obligations under WIS. STAT. § 971.23(1). Hebert contends

[2] The wire transmissions primarily picked up Martinez' side of these conversations.

[3] The videos do not depict the actual transfer of the drugs and money.

that the prosecutor violated § 971.23(1)(f) by failing to timely disclose Martinez' criminal history and the deferred conviction agreement and violated § 971.23(1)(bm) by failing to timely produce all recorded conversations between Martinez and Hebert.[4] We disagree.

¶6 Upon demand and within a reasonable time before trial, a prosecutor must disclose to the defendant certain material and information if it is within the possession, custody or control of the State. WIS. STAT. § 971.23(1). This duty applies to the criminal record of a prosecution witness which is known to the district attorney. Sec. 971.23(1)(f). It also applies to recordings of telephone and wire intercepts if the prosecutor intends to use this evidence at trial. Sec. 971.23(1)(bm).

¶7 This court analyzes alleged violations of WIS. STAT. § 971.23(1) in three steps, each posing a question of law for this court. ***State v. Rice***, 2008 WI App 10, ¶14, 307 Wis. 2d 335, 743 N.W.2d 517 (Ct. App. 2007). First, this court determines whether the State failed to disclose information or material it was required to disclose under § 971.23(1).[5] ***Rice***, 307 Wis. 2d 335, ¶14. Next, this

[4] Hebert does not argue that the prosecutor's alleged failure to timely disclose this evidence violated his constitutional rights under ***Brady v. Maryland***, 373 U.S. 83 (1963).

[5] Under WIS. STAT. § 971.23, the State's discovery obligations may extend to information or material that is in the possession of law enforcement agencies, even though it is not personally known to the prosecutor. ***State v. DeLao***, 2002 WI 49, ¶21, 252 Wis. 2d 289, 643 N.W.2d 480.

court decides whether the State had good cause for any failure to disclose under § 971.23(1). ***Rice***, 307 Wis. 2d 335, ¶14. Undisclosed evidence must be excluded absent good cause. ***Id.*** However, if good cause exists, the trial court may admit the evidence and grant other relief, such as a continuance. ***Id.*** Finally, if the evidence should have been excluded under the first two steps, this court is required to determine whether the admission of the evidence was harmless. ***Id.***

¶8 For information or material to be disclosed "within a reasonable time before trial," as required by WIS. STAT. § 971.23(1), it must be disclosed within sufficient time for its effective use. ***State v. Harris***, 2004 WI 64, ¶37, 272 Wis. 2d 80, 680 N.W.2d 737. We agree with the State that Hebert was provided with the required material and information with sufficient time to prepare for trial. A violation of § 971.23(1) therefore did not occur.

¶9 The record establishes that Hebert's original appointed counsel, Attorney Barbara Kirchner, filed a demand for discovery in March 2007, requesting the criminal and juvenile delinquency records of all prosecution witnesses; the disclosure of any promises, rewards, or inducements made in connection with this case by the State or its agents; and all electronic surveillance. In May 2007, Kirchner withdrew as Hebert's attorney based on his desire to retain new counsel. Attorney Robert Wells was appointed and appeared on Hebert's behalf in June 2007.

¶10 On November 26, 2007, one day before the trial scheduled for November 27, 2007, Wells moved the trial court to exclude Martinez as a witness at trial based on the prosecutor's alleged inadequate compliance with the discovery demand. Wells indicated that he had Martinez' criminal history and was aware of the DCA, but had learned only the Friday before that a condition of the DCA was that Martinez cooperate with the prosecution in this case. Wells indicated that the prosecutor had also only recently provided him with a police contact sheet for Martinez, indicating that Martinez had been arrested for disorderly conduct, a municipal ordinance violation, subsequent to the DCA, with no attempt to revoke the DCA. Wells contended that the delay in providing this information did not allow him adequate time to investigate whether additional consideration had been given to Martinez for his cooperation with the prosecution in this case and other cases, including a decision by the prosecutor to refrain from moving to vacate the DCA despite the new charge. Based on the prosecutor's failure to provide this information sooner, Wells moved the trial court to impose a sanction and prohibit the State from using Martinez as a witness. Alternatively, he moved for an adjournment of the trial. The trial court granted an adjournment of trial to January 8, 2008, concluding that Hebert would not be prejudiced because he was incarcerated and about to begin a sentence in an unrelated case.

¶11 The parties appeared for another hearing on January 7, 2008. At that hearing, Wells stated that after the last hearing the prosecutor had provided him

with a police contact sheet establishing that Hebert had been arrested for ordinance violations of disorderly conduct and battery and the violation of a restraining order in August 2007 and that he intended to rely on that information to contend that the prosecutor's failure to revoke the February 2007 DCA was additional consideration to Martinez. Wells also informed the trial court that Hebert might want to discharge him due to a disagreement. In addition, the parties discussed whether tapes of all recorded conversations between Martinez and Hebert had been provided. After discussion and a telephone call to Brachmann in the MEG unit, it was determined that recordings of two phone calls had not yet been provided to the defense.[6] Wells indicated that he needed to review those recordings to determine whether they contained exculpatory material and requested an adjournment of the trial so that he and Hebert could review the additional recordings and Hebert could determine whether he wanted to discharge Wells. The trial court granted the requested adjournment.

¶12 Four days later, the trial court issued an order permitting Wells to withdraw as counsel "for the reasons stated by parties on 1-7-08."[7] By letter dated January 27, 2008, Hebert notified the trial court that he would be proceeding pro se and asked for the appointment of stand-by counsel. However, on February 5,

[6] The prosecutor indicated that he did not have the additional recordings either.

2008, Hebert indicated to the trial court at a status conference that he was contacting the state public defender about the appointment of new counsel. On February 7, 2008, Attorney Marcus Falk was appointed as counsel for Hebert.

¶13 At a short hearing on July 10, 2008, Falk and the prosecutor confirmed that they were requesting an adjournment to allow time to look for evidence that was believed to be contained in tape-recorded conversations. On September 23, 2008, Falk withdrew based on a conflict of interest. Attorney George Limbeck was appointed as new counsel for Hebert on October 21, 2008, but also withdrew based on a conflict of interest on February 3, 2009, shortly before the scheduled trial date of February 11, 2009. Hebert's fifth attorney, Robert Horsch, was appointed on February 9, 2009, and trial was rescheduled for May 11, 2009.

¶14 On May 5, 2009, Horsch moved to adjourn the trial, stating that he needed time to subpoena additional witnesses that he had just learned about from Hebert. The trial court initially denied the motion. However, on May 7, 2009, Horsch moved to withdraw, stating that although Hebert had not requested that counsel withdraw, he was refusing to cooperate or work with counsel to prepare the defense. Because Horsch was already the fifth defense attorney in this case,

[7] At subsequent hearings on May 7 and July 14, 2009, the trial court indicated that it also permitted Attorney Wells to withdraw because it had to adjourn the trial anyway based on the State's failure to provide all discovery before then.

the trial court declined to grant the motion to withdraw, but stated that it would adjourn the trial to August 18, 2009, to give Hebert and Horsch time to establish a relationship and prepare for trial.

¶15 On July 14, 2009, a motion hearing was held in the trial court. Among other things, Horsch moved to suppress all video and audio evidence in this case based on the prosecutor's alleged failure to turn over audio and video recordings depicting a telephone call made by Martinez to Hebert from a pay phone at South 17th Street and Indiana Avenue prior to the January 29, 2007 transaction.[8] In response, the prosecutor indicated that, based on his contacts with the MEG unit, he believed all recordings had been provided to the defense. Ultimately, the prosecutor and Horsch agreed to jointly contact the MEG unit to determine whether any recording as discussed by Horsch existed or was missing. At this hearing, the trial court also confirmed that the defense had

[8] Attorney Horsch also moved to dismiss based on an alleged violation of Hebert's speedy trial rights, which will be discussed later in this decision.

received all available information concerning Martinez' criminal history and any consideration he received for his cooperation and testimony in this case.

¶16 At a pretrial motion hearing on August 17, 2009, the prosecutor followed up on the July 14, 2009 discussion concerning a missing recording. He stated:

> Last time we were here, there was a request about all audio recordings. I think it should be on the record that Attorney Horsch and I in my office via speakerphone … made phone contact with a member of the MEG unit, asked for any and all recordings concerning this case, these two buys. I received two copies of recording one, which I provided to Attorney Horsch, one which I kept for myself. It's my understanding that both State and defense have all audio recordings that exist for this case.

Horsch expressed no disagreement with this statement by the prosecutor.[9] However, when trial began the next day on August 18, 2009, Horsch again moved to dismiss, claiming that an audio recording of the phone call that Martinez made on January 29, 2007, at 10:06 a.m. from South 17th Street and Indiana Avenue was still missing.

¶17 In his appellant's brief, Hebert concedes that the recording referred to by Horsch on August 18, 2009, was not missing and that it was played for the jury. However, he reiterates his position that there was an additional recording

[9] As pointed out by the State in its respondent's brief, it is unclear whether "recording one" referred to by the prosecutor was a previously undisclosed recording, or was something that had been provided at an earlier date.

that was not previously provided to the defense and was not turned over until August 2009.

¶18 Based upon this history, we reject Hebert's claim that he is entitled to relief based on the prosecutor's delay in disclosing material under WIS. STAT. § 971.23(1)(bm) and (f). As set forth above, disclosure of information related to Martinez' criminal history and consideration given to him by the prosecutor's office in exchange for his cooperation and assistance in this case was addressed at the November 27, 2007 hearing. At the January 7, 2008 hearing, Wells indicated that the prosecutor had provided him with additional information concerning charges against Martinez in August 2007. The matter was never raised again.[10] Consequently, it is clear that Hebert was provided with all information regarding Martinez' criminal history and the inducements given to him for his cooperation in

[10] As discussed in Hebert's third argument on appeal, he subsequently moved the trial court for an in camera review of other MEG records involving Martinez. However, those records were unrelated to Martinez' involvement in this case and, as determined by the trial court, contained no information that was exculpatory or relevant to this case.

this case within sufficient time for its effective use at trial. The information was thus disclosed "within a reasonable time before trial" as required by § 971.23(1).[11]

¶19 Similarly, we agree with the State that Hebert was provided with the audio and video recordings with sufficient time to prepare for trial. As detailed above, all recordings were turned over to the defense before trial. Nothing in Hebert's argument or the record provides any basis for this court to conclude that the recordings were not turned over with sufficient time for the defense to make effective use of them at trial.[12]

¶20 Hebert also contends that he was denied his constitutional right to a speedy trial.[13] Whether a defendant has been denied his right to a speedy trial is a constitutional question which this court reviews de novo. ***State v. Leighton***, 2000

[11] Hebert attempts to ignore the prosecutor's provision of information after November 2007 by contending that the trial court should have prohibited Martinez from testifying as a witness when Wells moved for a sanction on November 26, 2007. He contends that he was prejudiced by the trial court's refusal to do so because without Martinez' testimony, the State would have been unable to prevail at trial. However, as noted by the State, if the trial court had excluded Martinez as a witness, the prosecutor could simply have requested dismissal of the case and refiled the charges. *Cf.* ***State v. Miller***, 2004 WI App 117, ¶¶10-11, 274 Wis. 2d 471, 683 N.W.2d 485. In any event, on November 26, 2007, the case had been pending for less than nine months. Nothing precluded the trial court from exercising its discretion to adjourn the trial, thus enabling the prosecutor to provide the requested information long before trial.

[12] This includes whatever recording was allegedly not turned over until August 2009. Hebert fails to identify this recording. He also fails to show how or why any delay in pretrial production of this or any other recording prevented his attorney from making effective use of the recordings at trial.

[13] The right to a speedy trial has both a statutory and constitutional basis. ***State ex rel. Hager v. Marten***, 226 Wis. 2d 687, 699, 594 N.W.2d 791 (1999). In his appellant's brief, Hebert states that he is not challenging the validity of his conviction based on his statutory right to a speedy trial.

WI App 156, ¶5, 237 Wis. 2d 709, 616 N.W.2d 126. However, the trial court's findings as to the underlying historical facts will not be disturbed unless they are clearly erroneous. ***Id.***

¶21 Courts employ a four-part balancing test when analyzing whether a defendant's constitutional speedy trial right has been violated. ***State v. Borhegyi***, 222 Wis. 2d 506, 509, 588 N.W.2d 89 (Ct. App. 1998). The court must consider: (1) the length of the delay, (2) the reason for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) whether the delay resulted in any prejudice to the defendant. ***Leighton***, 237 Wis. 2d 709, ¶6; ***Borhegyi***, 222 Wis. 2d at 509. "The right to a speedy trial, however, is not subject to bright-line determinations and must be considered based upon the totality of circumstances that exist in any specific case." ***Borhegyi***, 222 Wis. 2d at 509. In evaluating a speedy trial claim, the court must review each of the four factors and conclude its analysis by weighing the totality of the circumstances presented by the case. ***Id.*** at 510. "Essentially, the test weighs the conduct of the prosecution and the defense and balances the right to bring the defendant to justice against the defendant's right to have that done speedily." ***State v. Urdahl***, 2005 WI App 191, ¶11, 286 Wis. 2d 476, 704 N.W.2d 324.

¶22 Hebert was charged in March 2007 and was tried in August 2009. This delay was presumptively prejudicial because it exceeded one year. *See* ***id.***, ¶12. However, none of the remaining factors weigh in Hebert's favor.

¶23 Contrary to his contention on appeal, Hebert did not assert his right to a speedy trial prior to his July 14, 2009 motion to dismiss alleging a violation of his right to a speedy trial. In his January 27, 2008 letter notifying the trial court of his intent to proceed pro se, Hebert stated: "Finally, in the near future I hope to move for a speedy trial to expedite this matter to trial without further delay." As correctly determined by the trial court, this letter did not constitute a demand for a speedy trial. Since Hebert never thereafter filed such a motion, he did not invoke his right to a speedy trial.

¶24 When considering the reason for the delay in bringing a defendant to trial, a court must identify the reason for each particular portion of the delay and accord different treatment to each category of reasons. ***Id.***, ¶26. The government's deliberate attempt to delay the trial in order to hamper the defense would weigh heavily against the State, while delay caused by the State's negligence or overcrowded courts, although still weighed against the State, is weighed less heavily. ***Id.*** Delay caused by something intrinsic to the case, like witness unavailability, is not counted. ***Id.*** Delay caused by the defendant is also not counted against the State. ***Id.***

¶25 Applying these standards, we conclude that most of the delay in this case was attributable to Hebert rather than the State. After Kirchner was appointed to represent him in March 2007, Hebert chose to discharge her and attempted to retain private counsel. When he was unsuccessful in doing so, Wells

was appointed for him. Trial was originally scheduled for September 18, 2007, but was adjourned to November 27, 2007, when a witness for the State was unavailable.

¶26 The adjournment of trial from November 27, 2007, to January 8, 2008, based on the prosecutor's delayed production of discovery, was attributable to the State. However, the rescheduling of the January 8, 2008 trial was attributable not only to the State's delay in producing the recordings, but also because Wells moved to withdraw as requested by Hebert based on disagreements between them. Subsequent delays were primarily attributable to the appointment of three more attorneys for Hebert, two of whom withdrew because of conflicts of interest. Each successive appointment of counsel required time for processing the appointment, rescheduling of court proceedings, and investigation and preparation by the new attorney. While some delay of discovery also occurred during this time, on balance the majority of the delay cannot be deemed attributable to the State.

¶27 The final factor to consider is whether the delay resulted in prejudice to Hebert. The prejudice factor must be assessed in light of the interests of the defendant that the speedy trial right was designed to protect. ***Leighton***, 237 Wis. 2d 709, ¶22. The court must consider the following interests: (1) preventing oppressive pretrial incarceration, (2) minimizing the defendant's anxiety and concern, and (3) limiting the possibility that the defense will be impaired. ***Id.*** In

addition, when a defendant is detained on another charge, the failure to bring the pending charge to trial may cause prejudice by eliminating the possibility that concurrent sentences can be imposed. ***Green v. State***, 75 Wis. 2d 631, 638, 250 N.W.2d 305 (1977).

¶28 Pretrial incarceration is irrelevant here because, as acknowledged by Hebert, he was in custody on an unrelated matter from the time this complaint was filed until the time of trial. However, Hebert contends that he was prejudiced because he lost an opportunity to obtain a concurrent sentence. He also contends that the delay may have interfered with his ability to present a defense because it may have impaired the memories of alibi witnesses he intended to call or other witnesses.

¶29 The impairment of the defense is the most serious of the four types of prejudice set forth above because the inability of a defendant to prepare his case skews the fairness of the entire system. ***Leighton***, 237 Wis. 2d 709, ¶23. However, while Attorney Horsch speculated at the July 14, 2009 motions hearing that witnesses' memories might not be as clear as they would have been if the case had gone to trial earlier, he presented no proof to support such a claim. In addition, he provided no explanation as to why he failed to call any of the alibi witnesses listed in Hebert's June 8, 2009 Notice of Alibi. He made no showing that they did not testify because they had become unavailable or suffered memory loss.

¶30 We also reject Hebert's contention that he suffered prejudice by losing the possibility of a concurrent sentence. When Hebert was sentenced in this case, the trial court could have made his sentence concurrent to the sentence he was then serving in Sheboygan County circuit court case No. 2007CF117, but chose not to do so. Instead, the trial court made this sentence consecutive to the earlier sentence. Consequently, no basis exists to conclude that the delay in proceeding to trial in this case prejudiced Hebert. *See* ***Green***, 75 Wis. 2d at 638. Based on the totality of the circumstances, we therefore conclude that Hebert was not denied his right to a speedy trial.

¶31 As a final matter, Hebert requests that this court review the sealed MEG records which are included in the record on appeal and pertain to Martinez' involvement in other MEG cases unrelated to Hebert's case. At Hebert's request, the trial court conducted an in camera review of the MEG records and concluded that they contained no information that was exculpatory or relevant to this case. We have independently reviewed the records. *See* ***State v. Darcy N.K.***, 218 Wis. 2d 640, 655, 581 N.W.2d 567 (Ct. App. 1998). Based upon our review, we agree with the trial court's conclusions. Hebert's judgment of conviction is therefore affirmed.

By the Court.— Judgment affirmed.

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