COURT OF APPEALS
DECISION
DATED AND FILED

September 14, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-3364-CR **Cir. Ct. No. 00CF005394**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

EDWARD D. ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Edward D. Anderson appeals from a judgment of conviction of robbery by use of force, contrary to WIS. STAT. § 943.32(1)(a)

(2001-02),[1] and from orders denying his motions for postconviction relief. Anderson offers numerous arguments in support of his request that his conviction be reversed and the charge dismissed or, in the alternative, that he be given a new trial. Specifically, he argues that he was denied the effective assistance of trial counsel, was denied a speedy trial, is a victim of prosecutorial misconduct, was denied the effective assistance of "postconviction/appellate" counsel, and is entitled to a new trial in the interest of justice. This court rejects Anderson's arguments and affirms the judgment and orders.

BACKGROUND

¶2 In October 2000, the State charged Anderson with robbery by use of force for allegedly attacking William Coons, the boyfriend of Anderson's cousin, and taking Coons's car. At trial, Coons testified that he and Anderson were together at a friend's trailer and that he agreed to give Anderson a ride. During the ride, Anderson asked Coons to park in an alley so Anderson could briefly go talk to someone. Coons said Anderson asked him to come along and Coons reluctantly agreed. Just after both men exited the vehicle, Anderson attacked Coons, punching and kicking him until he was on the ground. Coons, who suffered two broken ribs in the attack, testified that Anderson took Coons's keys and drove off in Coons's car.

¶3 Anderson's defense theory at trial, developed through witness Sandra Beckman, was that Coons was attacked not by Anderson, but by two men in the alley who approached Coons's vehicle when it stopped. Beckman testified

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

that she was following Coons's vehicle to the alley because Coons was giving a ride to both Anderson and Beckman's friend, "Net." Beckman said that she saw Coons's vehicle stop and that Anderson and Net jumped out and ran away from the car. Beckman testified that as Anderson and Net ran away, two men approached the vehicle and violently attacked Coons, trying to pull him from the vehicle. Beckman said she left while Coons was still in the driver's seat and that she did not see what ultimately happened to him.

¶4 The jury found Anderson guilty of robbery by use of force and he was sentenced to six years of initial confinement and seven years of extended supervision. Anderson filed a notice of intent to pursue postconviction relief and appellate counsel was appointed to represent him. Appellate counsel filed a no-merit report on Anderson's behalf. In response, Anderson filed a letter with this court asking that appellate counsel's filings be rejected and indicating that he wanted to proceed with the appeal *pro se*.

¶5 In a strongly worded order, this court cautioned Anderson about the perils of proceeding *pro se* and reminded him that as a *pro se* litigant, he would be responsible for filing all necessary motions, presenting evidence and argument, filing necessary briefs and completing other tasks generally left to counsel. This court asked him to confirm, in writing, that he understood the risks and consequences of proceeding *pro se* and that successor counsel would not be appointed to represent him in the future. Anderson responded with a letter and a motion to proceed *pro se* confirming his desire to represent himself in this matter and to reject the no-merit report submitted by appellate counsel. Anderson's motion, together with his personal letter, convinced this court that he was knowingly, intelligently and voluntarily waiving his right to appellate counsel.

This court granted Anderson's motion, allowing appellate counsel to withdraw and Anderson to proceed *pro se*.

¶6 Anderson filed a motion for postconviction relief with the trial court that included a twenty-page memorandum in support of his arguments. After reviewing the State's response and Anderson's reply brief, the trial court issued a written decision denying Anderson's motion without a hearing. Anderson appealed to this court. One month later, Anderson sought leave from this court to remand the case to the trial court so that he could raise an additional issue. This court denied the motion and indicated that because the record had not yet been transmitted, Anderson could seek additional relief from the trial court. This court gave Anderson additional time to do so. In response, Anderson filed with the trial court both a motion for reconsideration and a motion for supplemental relief. The trial court denied these motions in a written decision. This appeal followed. The issues raised in the initial appeal and in Anderson's numerous postconviction motions are all properly before this court and will be addressed.

DISCUSSION

A. Ineffective assistance of trial counsel

¶7 Anderson argues that his trial counsel was ineffective for eleven reasons. This court follows a two-part test for ineffective assistance of counsel claims. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). A defendant must prove both that the attorney's performance was deficient and that the deficient performance was prejudicial. ***Strickland***, 466 U.S. at 687, ***Johnson***, 153 Wis. 2d at 127. An attorney's performance is deficient if the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant

by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. "The defendant must also establish prejudice, defined as a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." ***State v. Guerard***, 2004 WI 85, ¶43, ___ Wis. 2d ___, 682 N.W.2d 12 (citing ***Strickland***, 466 U.S. at 694). A movant must prevail on both parts of the test to be afforded relief. *See* ***Johnson***, 153 Wis. 2d at 127.

¶8 At the outset, this court addresses Anderson's contention that the trial court erroneously denied him a ***Machner***[2] hearing to determine whether trial counsel was ineffective. Trial courts are not required to hold an evidentiary hearing in all cases where a defendant alleges ineffective assistance of counsel. *See* ***State v. Bentley***, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996). "If the motion on its face alleges facts which would entitle the defendant to relief, the [trial] court has no discretion and must hold an evidentiary hearing." ***Id.*** at 310.

¶9 Recently, the Wisconsin Supreme Court clarified the test for determining whether a postconviction motion is sufficient to warrant a hearing. *See* ***State v. Allen***, 2004 WI 106, ¶ 23, ___ Wis. 2d ___, 682 N.W.2d 433.

> As an assistance to defendants and their counsel, we propose that postconviction motions sufficient to meet the ***Bentley*** standard allege the five "w's" and one "h"; that is, who, what, where, when, why, and how. A motion that alleges, within the four corners of the document itself, the kind of material factual objectivity we describe above will necessarily include sufficient material facts for reviewing courts to meaningfully assess a defendant's claim.

[2] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

Id. (footnote omitted). Applying these tests, this court agrees with the trial court's conclusion that no hearing was required.

1. Waiver of right to speedy trial

¶10 Anderson argues that his counsel was ineffective because he "coerced Anderson to waive his speedy trial under a fraudulent and misleading premise." The parties agreed on January 31, 2001, to postpone the trial so that Anderson could take a polygraph test. The trial court specifically asked Anderson whether he was giving up his right to a speedy trial and Anderson assured the court three times that he wished to do so. The trial court concluded that Anderson clearly waived his right to a speedy trial in open court. Nothing in Anderson's motion asserts facts which, if true, would establish that his counsel was ineffective. Vague claims about "fraudulent" and "misleading premise" are opinions, not facts. The trial court did not erroneously exercise its discretion on this ground in denying Anderson's motion without a hearing.

2. Alleged failure to subpoena witnesses

¶11 Anderson argued that his counsel was ineffective for failing to subpoena nine witnesses, including four law enforcement officers, whose exculpatory testimony he claims was "paramount" to his defense. Anderson does not specify how the lack of that testimony prejudiced him. Even after reviewing both of Anderson's briefs, this court still does not know Anderson's theory of how counsel's failure to call specific witnesses resulted in Anderson's conviction. Because Anderson has not met the standard articulated in ***Allen***, this court concludes that the trial court correctly concluded that this aspect of Anderson's motion was insufficient to warrant a hearing or relief.

3. Removal of jurors for cause

¶12 Anderson's third argument is that his trial counsel failed to move the trial court to "remove biased jurors for cause" or failed to use his peremptory challenges to assure an impartial jury. Specifically, he challenges counsel's decision not to move to strike for cause a potential juror who worked for the Milwaukee County Sheriff's Department and four potential jurors who indicated that they would like to hear from the defendant. This court interprets his argument to be that these five potential jurors were either subjectively or objectively biased and that Anderson's counsel should have moved to dismiss them for cause or should have used peremptory challenges to remove them from the jury.

¶13 Subjective bias "is revealed through the words and the demeanor of the prospective juror" and "refers to the prospective juror's state of mind." ***State v. Faucher***, 227 Wis. 2d 700, 717, 596 N.W.2d 770 (1999). "Discerning whether a juror exhibits this type of bias depends upon that juror's verbal responses to questions at *voir dire*, as well as that juror's demeanor in giving those responses." ***State v. Kiernan***, 227 Wis. 2d 736, 745, 596 N.W.2d 760 (1999) (emphasis added). The trial court sits in the best position to judge this type of bias. *See* ***id.*** Thus, this court will uphold the trial court's factual finding as to whether a prospective juror is subjectively biased unless it is clearly erroneous. ***Id.***

¶14 "[T]he focus of the inquiry into 'objective bias' is not upon the individual prospective juror's state of mind, but rather upon whether the reasonable person in the individual prospective juror's position could be impartial." ***Faucher***, 227 Wis. 2d at 718. Whether a juror is objectively biased is a mixed question of fact and law. ***Id.*** at 720. A trial court's findings regarding the facts and circumstances surrounding *voir dire* and the case will be upheld unless

they are clearly erroneous. ***Id.*** Whether those facts fulfill the legal standard of objective bias is a question of law. ***Id.*** Although this court does not ordinarily defer to the trial court's determination of a question of law, this court will give weight to the trial court's conclusion on that question. *See* ***id.*** This court will reverse the court's conclusion only if as a matter of law a reasonable judge could not have reached such a conclusion. ***Id.*** at 721.

¶15 Anderson appears to argue that Deputy Inspector Kevin Carr, an employee of the Milwaukee County Sheriff's Department who ultimately served on the jury, was either subjectively or objectively biased, or both. Anderson acknowledges that law enforcement officers are not *per se* ineligible to serve as jurors, *see* ***State v. Louis***, 156 Wis. 2d 470, 479, 457 N.W.2d 484 (1990), but asserts that the fact that Carr knew one of the witnesses is evidence of bias.

¶16 The trial court rejected this argument, specifically finding that trial counsel was not ineffective for failing to remove Carr and implicitly concluding that Carr was neither subjectively or objectively biased. This court agrees with these conclusions. Carr indicated in response to general questions that he knew a witness and that the witness worked for the Sheriff's Department. The court specifically inquired about his acquaintance with the witness and asked whether he believed he would be able to be fair and impartial. Carr twice answered, "Absolutely."

¶17 Our review of the transcript convinces us that the trial court's conclusion that Carr was not subjectively biased is not clearly erroneous. Further, the fact that Carr is a law enforcement officer is not, without more, evidence of objective bias. *See* ***Louis***, 156 Wis. 2d at 483 ("Absent actual proof to the contrary elicited during *voir dire*, there is simply no basis for concluding that law

enforcement officials would not act in accordance with their sworn duty and decide a case impartially on the basis of the evidence presented."). Because both the trial court and this court conclude that there is no evidence of subjective or objective bias, trial counsel was not ineffective for failing to move to strike Carr from the panel.

¶18 Anderson also argues that his trial counsel should have moved to strike four potential jurors who each indicated that they "would like" to hear testimony from the defendant. Anderson's counsel asked for the jurors' thoughts on hearing from the defendant, inquiring whether anyone felt that they would be unable to find Anderson not guilty if he chose not to testify. In response, four jurors indicated that they would like to hear from Anderson. Counsel explored the reasons why they wanted to hear from the defendant, and then proceeded to ask those same jurors whether they understood that he could decide not to testify. Counsel asked each of the four jurors if they could be "fair and impartial to Mr. Anderson if he chooses not to testify." All four specifically indicated they could. This court agrees with the trial court that there is no basis upon which to conclude that these jurors were subjectively biased. Counsel was not ineffective for failing to move to strike them from the panel.

¶19 Anderson has not presented facts, argument or case law to support his assertion that his trial counsel was ineffective for failing to use peremptory challenges to strike the same five jurors. This court can only assume his argument is based on his theory that the jurors were biased. Having agreed with the trial court that the jurors were not subjectively or objectively biased, this court rejects this argument without further discussion. *See* ***Gallagher v. Grant-Lafayette Elec. Coop.***, 2001 WI App 276, ¶27 n. 17, 249 Wis. 2d 115, 637 N.W.2d 80 (court of appeals does not consider arguments broadly stated but never specifically argued).

4. Additional arguments

¶20 Anderson argues that there are eight additional reasons why his counsel was ineffective: failing to adequately argue the use of letters; failing to object to the State's reference to a parole revocation hearing; failing to object to witness testimony not disclosed in discovery; failing to object to in-court witness identification; coercing Anderson to waive his right to testify; failing to investigate and prepare a defense; attacking Anderson's credibility in closing arguments; and failing to move the trial court for a mistrial for prosecutorial misconduct. On appeal, Anderson's arguments on each of these issues vary from a single sentence to three paragraphs. Often, there are no references to case law or an explanation of how he may have been prejudiced by each alleged error. Because these issues are not adequately briefed, this court declines to address them. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals may decline to address issues inadequately briefed).

B. Whether the defendant was denied his right to a speedy trial

¶21 In his postconviction motion, Anderson included a one-sentence argument under the heading, "Denial of Speedy Trial." The argument stated, "Defendant requested a speedy trial and was denied this right when it took (16) months to bring him to trial." Anderson did not raise the issue again in his reply brief. On appeal, Anderson alleges he was denied his constitutional right to a speedy trial and for the first time provides a detailed argument and cases in support of his assertion. Because this issue was not developed at the trial court level, the trial court did not make detailed historical findings. However, this court can infer from the trial court's decision and the trial transcripts the relevant factual findings needed to address Anderson's constitutional claim. *See* ***State v.***

Hubanks, 173 Wis. 2d 1, 27, 496 N.W.2d 96 (Ct. App. 1992) (where trial court did not make specific findings of fact, this court may assume on appeal that such findings of fact were made implicitly in favor of its decision).

¶22 The analysis used to determine whether a defendant's right to a speedy trial has been violated is set forth in ***Barker v. Wingo***, 407 U.S. 514 (1972), and was adopted in Wisconsin in ***Day v. State***, 61 Wis. 2d 236, 244-46, 212 N.W.2d 489 (1973). ***State v. Borhegyi***, 222 Wis. 2d 506, 509, 588 N.W.2d 89 (Ct. App. 1998). When a defendant asserts a violation of his constitutional right to a speedy trial, the court employs a four-part balancing test considering: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. ***Barker***, 407 U.S. at 530. This court reviews each of these factors in turn and concludes the analysis by weighing the totality of the circumstances presented by this case.

1. Length of delay

¶23 Until there is some delay that is presumptively prejudicial it is unnecessary to inquire into the other ***Barker*** factors. ***Id.*** The State agrees with Anderson that the sixteen-month delay is presumptively prejudicial. This court agrees.

2. Reason advanced for the delay

¶24 The second element to be considered in evaluating a claimed violation of a defendant's speedy trial rights is the reason advanced for the delay. ***Id.*** at 531. "A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government" while "[a] more neutral reason such as negligence or overcrowded courts should be weighed less heavily but

nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." ***Id.*** Anderson was bound over for trial on November 10, 2000, and requested a speedy trial. The case was set for trial on January 31, 2001. It was rescheduled at the request of both parties. Anderson's counsel sought a delay so that his client could take a lie detector test to prove his innocence to the State. The State promised to dismiss the charges if Anderson passed the test. In addition, the State wished to investigate recent information concerning whether Anderson had contacted the victim. The trial court questioned Anderson about his decision to waive his right to a speedy trial and to delay the case. Being satisfied that the waiver was knowingly and voluntarily made, the trial court agreed to the request and set the case for a status conference on March 1.

¶25 At the March 1 status conference, the trial was set for April 25. On that day, Anderson requested an additional adjournment to further investigate an updated fingerprint report that found a match for prints on Coons's vehicle. The trial was then set for July 9, but was later rescheduled because Anderson's attorney had to try another case in a different court.

¶26 On September 5, 2001, the parties appeared for trial before a different judge who was available to hear the case. Unfortunately, one of the State's witnesses could not be located. After discussing the matter at length, the trial court reluctantly rescheduled the trial, noting that it would be the last continuance. When Anderson's counsel noted that he was not seeking an adjournment, the trial court responded, "I just want to make it clear to both sides because both sides have been complicit in the repeated adjournments of this case that next time is going to be the last time." The case was rescheduled for trial November 12.

¶27 On November 12, 2001, and February 6, 2002, the case was rescheduled due to court congestion. The case was ultimately tried February 18, 2002.

¶28 The case was delayed once at the request of both parties, twice at the request of Anderson or his counsel, once at the State's request, and twice because of court congestion. Delays at Anderson's sole or joint request constituted approximately seven months of delay. There is nothing in the record to indicate that the State's delays were designed to gain an unfair advantage.

3. Whether defendant asserted right to a speedy trial

¶29 The third factor to be considered is whether Anderson asserted his right to a speedy trial. *See* ***id.*** at 531. It is undisputed that Anderson initially made a speedy trial demand. The trial court's finding that Anderson waived this right at the January 31 hearing is not clearly erroneous. The record demonstrates no objection by Anderson to any of the subsequent adjournments. Having once waived the right to a speedy trial, and never having withdrawn that waiver or objected to a later delay, Anderson cannot now be heard to complain of delays to which he did not object. *See* ***State v. Boshcka***, 178 Wis. 2d 628, 642, 496 N.W.2d 627 (Ct. App. 1992) ("[U]nobjected-to errors are generally considered waived, and the rule applies to both evidentiary and constitutional errors.").

4. Whether the delay prejudiced the defendant

¶30 The final factor to be considered is whether the delay resulted in prejudice to Anderson. *See* ***Barker***, 407 U.S. at 532. The ***Barker*** court identified three interests to consider: (1) preventing oppressive pretrial incarceration; (2) minimizing the accused's anxiety and concern; and (3) limiting the possibility

that the defense will be impaired. *See* ***id.*** Anderson acknowledges that he was in custody on other charges while awaiting trial in this case. He does not suggest that his ability to present a defense was hampered by the delay, or that he suffered increased anxiety as a result of the delay. Rather, he argues that the delay affected his participation in prison-based programming and schooling.

5. Weighing of *Barker* factors

¶31 In this case, weighing all of the factors, this court is convinced that the delay in bringing Anderson to trial was not a violation of his constitutional right to a speedy trial under either the United States or Wisconsin Constitutions. Although the sixteen-month delay before the actual trial is presumptively prejudicial, Anderson initiated seven months of that delay, affirmatively waived his right to speedy trial so that he could take a polygraph test, and cannot identify any prejudice other than an inability to participate fully in prison programming. These factors do not establish that his rights have been violated.

C. Allegations of prosecutorial misconduct

¶32 Anderson argues that the State engaged in prosecutorial misconduct in the following ways: (1) it knew or should have known that the testimony of one of its witnesses, Kevin White, was perjurious; and (2) the State intimidated defense witness Beckman by telephoning her prior to the trial and threatening to investigate her and get her terminated from her employment if she testified.

¶33 The trial court rejected Anderson's assertions, implicitly finding that there was no evidence that White perjured himself, that the State knew he perjured himself or that the State contacted the defense witness. There are no affidavits or other facts in the record that support Anderson's claims with respect to White and

Beckman. This court concludes that the trial court's findings are not clearly erroneous.

D. Ineffective assistance of "postconviction/appellate" counsel

¶34 Anderson argues that he was denied the effective assistance of "postconviction/appellate counsel." However, his arguments relate solely to the performance of his postconviction counsel who initially investigated grounds for appeal after Anderson was convicted. Pursuant to ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681, 556 N.W.2d 136 (Ct. App. 1996), a claim of ineffective assistance of postconviction counsel should be raised in the circuit court either by a petition for a writ of *habeas corpus* or a motion under WIS. STAT. § 974.06 after the completion of his direct appeal. This court declines to address Anderson's claim of ineffective assistance of postconviction counsel because the issue is not properly before this court and the trial court has not had an opportunity to make findings with respect to counsel's performance.[3]

E. New trial in the interest of justice

¶35 Anderson argues he is entitled to a new trial in the interest of justice, offering in support only his conclusory statements suggesting that a new trial would produce a different result. This court is not persuaded. Anderson's alleged errors have all been resolved in favor of upholding the judgment and orders

[3] Although this court is not deciding whether Anderson waived his right to make this argument when he specifically informed this court that he intended to proceed *pro se*, this court urges Anderson to carefully consider whether he has a viable claim for ineffective assistance of postconviction counsel before filing any motions.

denying postconviction relief. He has not presented any further evidence to convince this court that justice was not served in this case.

CONCLUSION

¶36 Anderson has not persuaded this court that the trial court erred when it denied his request for a hearing and his postconviction motions. Further, this court is unconvinced that he is entitled to a new trial or that his conviction should be reversed on any other grounds. Accordingly, this court affirms the orders and judgment.

By the Court.—Judgment and orders affirmed.

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