COURT OF APPEALS
DECISION
DATED AND RELEASED

November 9, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-1620-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LEON TAYLOR,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County: ROBERT R. PEKOWSKY, Judge. *Affirmed*.

Before Eich, C.J., Gartzke, P.J., and Dykman, J.

PER CURIAM. Leon Taylor appeals from a judgment of conviction entered after a jury trial in which Taylor was found guilty of theft, contrary to § 943.20(1)(a)(3)(b), STATS., and possession of cocaine, contrary to §§ 161.41(3m) and 161.14(7)(a), STATS., with an increased penalty for habitual criminality, contrary to §§ 939.62 and 939.62(1)(a), STATS. Taylor was found not guilty of burglary. Taylor argues that his statutory and constitutional right to a

speedy trial was denied, and that the charges against him were misjoined. We reject his arguments for the reasons set forth below.

BACKGROUND

The record reveals that on April 5, 1992, a woman staying in the University of Wisconsin-Madison Union South guest rooms discovered that sixty-one or sixty-two one-hundred-dollar bills had been taken from her room in her absence. Nothing else was missing from the room, and the investigating officer determined that there was no sign of forced entry. Taylor, a custodian at Union South, was among those personnel with access to the room key.

On April 5, 1992, Taylor checked into a Howard Johnson's, paying cash for his stay. On April 6, 1992, Taylor opened a $520 savings account at a local bank. Included in the deposit were five one-hundred-dollar bills.

On April 8, 1992, a Madison police officer saw Taylor at the Howard Johnson's in the company of another person. A consensual search[1] of Taylor's room produced a small amount of cocaine residue, as well as seventeen one-hundred-dollar bills. Taylor stated at the time of the search that all the items in the room were his.

An information was filed which charged Taylor with burglary, theft and possession of cocaine.

Because this case involves the claim that speedy trial was denied, we set forth the following chronology:

DATE	EVENT

[1] Although there was some dispute in the circuit court as to whether the search was consensual, the circuit court determined that it was, as a matter of fact. That point is not further challenged before this court.

4/9/92 complaint filed; defendant makes initial appearance.

4/16/92 preliminary hearing scheduled, defendant requests and gets new counsel.

4/22/92 preliminary hearing and bindover.

5/14/92 information filed, arraignment and motion hearing

5/20/92 defendant files motion *in limine*, motion to suppress, motion for severance, demand for discovery, motion to dismiss.

6/3/92 defendant files motion to disqualify the prosecutor.

7/27/92 hearing on motion to disqualify the prosecutor; trial court denies the motion, finding no legal basis for it.

10/8/92 motion hearing on suppression and severance motions.

12/9/92 jury draw set for January 25, 1993, before the Honorable Robert R. Pekowsky, with trial set for January 27 and 28, 1993, before the Honorable John C. Ahlgrimm.

12/18/92 defendant files request for substitution of Judge Ahlgrimm.

12/29/92 case is reassigned to Judge Pekowsky for jury draw on March 29, 1993, and jury trial on March 31 and April 1, 1993.

2/25/93 defendant motion to disqualify Judge Pekowsky.

3/25/93 order entered denying the disqualification motion; prosecution requests delay in trial date because chief witness has recently had a baby.

3/26/93 defendant files a petition for leave to appeal the order denying his disqualification motion.

4/19/93 court of appeals denies the petition for leave to appeal.

5/3/93 defendant files motion to reconsider motion to suppress evidence.

5/5/93 defendant files motion to compel fingerprints from the victim.

5/17/93 defendant files various motions *in limine*.

5/18/93 defendant files motion to conduct fingerprint analysis and motion to reconsider severance motion.

5/25/93 defendant's first jury trial begins and ends in a mistrial.

5/26/93 prosecution notifies the court and defense counsel that the alleged victim will be out of the country from June 18 until about August 15, 1993, and asks that new trial date take this into consideration; defense counsel files a speedy trial demand.

6/2/93 trial set for August 16, 1993.

6/7/93 prosecutor asks court to adjourn trial until after August 20, 1993, due to absence of chief witness.

6/11/93 trial set for October 4, 1993; thereafter defendant does not object

8/25/93 hearing held at which defendant objects to court's jurisdiction because ninety days have elapsed since filing of speedy trial demand.

8/27/93 hearing held on motion to disqualify prosecutor; court denies the motion.

9/24/93 defendant files motion to dismiss based on *inter alia*, denial of speedy trial right.

10/4/93 court denies motion to dismiss based on denial of speedy trial right, finds defense counsel partly to blame for

permitting trial to be scheduled outside the ninety day statutory period, and case proceeds to jury trial.

SPEEDY TRIAL

Taylor argues that his right to speedy trial was denied. We disagree. The chronology establishes that much of the year-long delay between the filing of the information and the May 1993 mistrial was caused by various defendant-initiated motions, two requests for substitution, a petition for leave to appeal, motions for reconsideration and the like. The defendant-initiated motions routinely contain the allegation that the motion is not brought for the purpose of delay, but to assure the defendant's rights. This standard allegation strongly suggests that defendant was aware of the potential for delay each motion engendered, but judged that it was more important to bring the motion than to expedite the trial. The record also establishes that no speedy trial request was filed until after the mistrial.

Legal Standard

The United States Supreme Court has set forth a four-factor analysis by which to determine whether delay in bringing a criminal case to trial violates the right to a speedy trial set forth in the Sixth Amendment to the United States Constitution. We must consider the length of the delay, the reason for the delay, whether and how defendant asserted his speedy trial right, and the prejudice to the defendant. ***Barker v. Wingo***, 407 U.S. 514, 530-31 (1972). Under the ***Barker*** test, we conclude that we must affirm the conviction.

Delay Until Mistrial

Applying these factors to the one-year delay between the filing of the information and the mistrial, as stated above, we conclude the reason for, and length of the delay can be attributed to the defendant's tactic of filing successive motions and substitution requests, as well as a petition for leave to appeal. We also note that he did not assert his right to a speedy trial before the first trial. As to the prejudice factor, defendant merely alleges general prejudice

without specific example. We have independently examined the record and have found no evidence that passage of time worked to the defendant's disadvantage. Therefore, we do not further consider the year delay between the arraignment and the first trial.

Mistrial

Taylor argues that the mistrial is attributable to the State. We disagree. As the trial court found, the mistrial resulted from a question posed by defense counsel to a prosecution witness over the State's objection. The court admitted that it should have sustained the objection and found that the mistrial was not the fault of the prosecution. Therefore, we decline to find that the mistrial was in any manner attributable to the State.

Delay After Mistrial

1. Statutory Period

Defendant argued before the trial court and again before this court that because more than the statutorily permitted ninety days passed from the speedy trial requested until the trial, the charges should be dismissed. Section 971.10(2), STATS. He also implies that he is being denied his United States constitutional right to a speedy trial. We disagree.

The record reveals that on May 26, 1993, defendant for the first time requested a speedy trial. Trial was originally set for August 16, 1993, well within the statutorily required ninety-day period. Section 971.10(2), STATS. From the record, it appears that date was selected because the prosecution had previously informed the court that the alleged victim (and chief witness) would be out of the country from June 18 until about August 15, 1993. However, the prosecution discovered that the chief witness would not be available for the August 16 date and therefore asked for a date after August 20. On June 11, 1993, the court rescheduled the trial for October 4, 1993.

When defendant was first informed on June 11, 1993, that the trial was being set for a time outside the statutory period, he did not object. In addition, the trial court found that defense counsel misled the court and opposing counsel into believing that the October date would work no hardship on his client because his client would remain incarcerated until December on other charges. In fact, the defendant was scheduled for release on August 3, 1993. The trial court found counsel had purposely failed to remedy the misimpression in order to set up for appeal the speedy trial issue. As the trial court stated, it was on the strength of this misimpression that the court allowed the trial to be scheduled outside the statutory speedy trial deadline. Having invited the error, if error it was, defendant may not now complain. ***Soo Line R.R. Co. v. Office of the Comm'r of Transp.***, 170 Wis.2d 543, 557, 489 N.W.2d 672, 678 (Ct. App. 1992).

2. Constitutional Rights

Going beyond § 971.10, STATS., the United States Constitution also guarantees a speedy trial. U.S. CONST. amend. VI. Unlike the statute, the United States Constitution contains no bright-line test specifying a certain number of days. Rather, the ***Barker*** four-factors test applies. ***Barker v. Wingo***, 407 U.S. at 533.

One of the ***Barker*** factors is "whether and how" defendant asserted the speedy trial right. As stated above, defense counsel permitted the court to remain under a misimpression concerning defendant's release date. Therefore the manner of asserting the right does not trigger ***Barker***, nor are constitutional concerns implicated.

MISJOINDER AND SEVERANCE

Taylor argues that the charges were misjoined, and that the trial court erred when it denied his motion to sever the charges. As Taylor acknowledges, misjoinder and severance are conceptually different. Within weeks of being charged, Taylor filed a motion to sever the charges. However, he never argued misjoinder until a motion filed very shortly before the first trial which ended in mistrial. Further, although the motion was filed, it was never

argued (although other pending motions were) and was not renewed after mistrial. Motions turning on a known point of law, but which are never argued, may be deemed abandoned. *Cf.* ***Polan v. Dep't of Revenue***, 147 Wis.2d 648, 660, 433 N.W.2d 640, 645 (Ct. App. 1988). We do not consider arguments not raised before the circuit court. ***Zeller v. Northrup King Co.***, 125 Wis.2d 31, 35, 370 N.W.2d 809, 812 (Ct. App. 1985). Therefore, we do not consider the misjoinder argument further.

Taylor argued before the circuit court that the charges should be severed because he would otherwise be impaired in his ability to testify to the drug charge without waiving his right not to testify in the theft and burglary charges. Whether charges should be severed is a matter within the discretion of the circuit court. ***State v. Hoffman***, 106 Wis.2d 185, 209, 316 N.W.2d 143, 157 (Ct. App. 1982).

Taylor argues that he wanted to take the stand to testify that he did not use drugs, and that no drugs were detected in a urine test administered shortly before the incident. However, as argued by the prosecution, a negative test for use does not preclude a conviction of possession. One may possess a drug, as Taylor was charged with doing, without using the drug. Because the testimony Taylor wished to present was not "important testimony" of the kind that compels severance, ***Holmes v. State***, 63 Wis.2d 389, 398 n.12, 217 N.W.2d 657, 662 (1974), the circuit court did not err in denying the motion for severance.

By the Court.--Judgment affirmed.

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