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May 17, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2015AP1035-CR State of Wisconsin v. Joseph A. Sullivan (L.C. # 2004CF91)

Before Kloppenburg, P.J., Lundsten and Higginbotham, JJ.

Joseph Sullivan appeals a judgment of conviction sentencing him to four years of initial confinement and four years of extended supervision for third-degree sexual assault. Sullivan contends that the State violated his right to a speedy trial by waiting seven-and-a-half years to move forward on its motion to revoke Sullivan's deferred prosecution agreement. Based upon

our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We summarily affirm.

In July 2004, an information was filed charging Sullivan with third-degree sexual assault, fourth-degree sexual assault, and misdemeanor battery. Pursuant to a plea agreement, Sullivan pled no contest to all of the charges. The court found Sullivan guilty of fourth-degree sexual assault and battery and placed Sullivan on probation for three years. The court accepted the parties' deferred prosecution agreement as to the third-degree sexual assault charge, and withheld adjudication on that charge for three years while Sullivan served his probation.

In November 2005, the Department of Corrections revoked Sullivan's probation. The State then moved to revoke Sullivan's deferred prosecution agreement. At the December 29, 2005 sentencing after revocation hearing, Sullivan requested additional time to review the State's motion to revoke the deferred prosecution agreement. The court therefore limited the hearing to sentencing as to the two misdemeanor charges.

The next event to occur in this case was a hearing on July 2, 2013, on the State's motion upon discovering that the case had not proceeded. Sullivan objected to proceeding on the State's motion to revoke the deferred prosecution agreement after the lengthy delay, and moved to dismiss the third-degree sexual assault charge. The court denied the motion to dismiss, granted the State's motion to revoke the deferred prosecution agreement, and sentenced Sullivan to four years of initial confinement and four years of extended supervision.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Sullivan contends that the State violated his right to a speedy trial by waiting seven-and-a-half years to move forward on its motion to revoke Sullivan's deferred prosecution agreement.[2] *See* ***State v. Allen***, 179 Wis. 2d 67, 72-73, 505 N.W.2d 801 (Ct. App. 1993) (holding that "the speedy trial clause of the sixth amendment applies from the time an accused is arrested or criminally charged, up through the sentencing phase of prosecution" (citation omitted)). Sullivan argues that the lengthy delay between the time the State moved to revoke the deferred prosecution agreement in December 2005 and when the State acted to pursue revocation and sentencing in July 2013 was a violation of his constitutional speedy trial right. We disagree.

We apply a four-part balancing test to determine whether the State violated a defendant's constitutional right to a speedy trial. *See* ***id.*** at 74. We consider: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right to a speedy trial; and (4) whether the delay prejudiced the defendant. *See* ***id.*** We apply the four-part test to speedy trial challenges arising from pre-verdict and post-verdict delays. ***Id.*** We apply the test de novo, while accepting the circuit court's factual findings, unless those findings are clearly erroneous. *See* ***State v. Leighton***, 2000 WI App 156, ¶5, 237 Wis. 2d 709, 616 N.W.2d 126.

There is no dispute that the seven-and-a-half-year delay is presumptively prejudicial. *See* ***State v. Borhegyi***, 222 Wis. 2d 506, 510, 588 N.W.2d 89 (Ct. App. 1998) (one-year delay is presumptively prejudicial). The presumption of prejudice "triggers further review of the

[2] The State argues that Sullivan forfeited his speedy trial claim by failing to clearly assert that claim in the circuit court and also waived it under the deferred prosecution agreement. *See* ***State v. Ndina***, 2009 WI 21, ¶¶29-31, 315 Wis. 2d 653, 761 N.W.2d 612. Sullivan argues that he preserved his speedy trial argument by adequately bringing the argument to the circuit court's attention, and that the deferred prosecution agreement did not cover his current speedy trial argument. Because we deny Sullivan's speedy trial claim on the merits, we decline to address whether either forfeiture or waiver applies.

allegation under the other three … factors." ***State v. Lemay***, 155 Wis. 2d 202, 212-13, 455 N.W.2d 233 (1990).

There is also no real dispute that the reason for the lengthy delay was the State's negligence. The State points out that this case was initially continued beyond Sullivan's sentencing after revocation hearing at Sullivan's request, and cites ***State v. Urdahl***, 2005 WI App 191, ¶26, 286 Wis. 2d 476, 704 N.W.2d 324, for the proposition that delay caused by a defendant is not considered in the speedy trial analysis. However, the State does not seriously contend that any significant portion of the seven-and-a-half-year delay was attributable to Sullivan. Instead, the State argues that the delay should not be weighted heavily against the State because it was caused by the State's negligence rather than by a nefarious motive. *See* ***id.*** ("A deliberate attempt by the government to delay the trial in order to hamper the defense is weighted heavily against the State, while delays caused by the government's negligence or overcrowded courts, though still counted, are weighted less heavily."). This factor weighs against the State, although it is not heavily weighted in our analysis.

It is also undisputed that Sullivan did not assert his speedy trial right at any time during the seven-and-a-half-year delay. Sullivan argues, however, that he timely asserted his speedy trial right when he returned to court on the State's motion in July 2013. He contends that he had no reason to assert his right to a speedy trial earlier in the process because he believed that the sentencing after revocation fully resolved the matter. He points out that it was the State's duty, not his, to move this case forward. *See* ***Barker v. Wingo***, 407 U.S. 514, 527 (1972). He argues that, under the circumstances, it would be unfair to use his failure to object against him. *See* ***id.*** at 528-29 (different weight should be accorded to a defendant's failure to object to delay based on the circumstances). The State concedes that the Supreme Court has held that the State has the

burden to move the case forward, but points out that the Court also "emphasize[d] that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." ***Id.*** at 532. On the facts of this case, we are uncertain whether Sullivan's failure to assert his right to a speedy trial until after the seven-and-a-half-year delay weighs against him in the analysis. Thus, we will assume for purposes of this decision that his failure does not weigh against him in our analysis.

Finally, Sullivan does not contend that he was prejudiced in fact by the delay in this case. He contends, however, that the excessive delay based solely on the State's negligence was necessarily prejudicial as a matter of law. *See* ***Hadley v. State***, 66 Wis. 2d 350, 364, 225 N.W.2d 461 (1975) (when a defendant claims a violation of his right to a speedy trial, "no burden is placed upon the defendant to show he was prejudiced in fact"; additionally, although "there may indeed be prejudice in fact because of the inability to produce defense witnesses after a protracted period of time, most interests of a defendant are prejudiced as a matter of law whenever the delay, not the result of the defendant's conduct, is excessive"). The State responds that the length of delay in this case does not, by itself, establish prejudice. The State also points out that the prejudice factor "dominates the four-part balancing test in postconviction cases," *see* ***Allen***, 179 Wis. 2d at 79, and argues that Sullivan has made no showing of prejudice by the delay in this case.

This court has explained that our analysis of a speedy trial claim differs when the claim is based on a violation of the right to a speedy sentencing rather than the right to a speedy trial.[3]

[3] We note that the delay in this case occurred after the circuit court accepted Sullivan's no contest plea and deferred prosecution agreement, and before the deferred prosecution agreement was (continued)

See ***id.*** at 74-75. This is because the defendant's switch "'from accused and presumed innocent to guilty and awaiting sentence is a significant change which must be taken into account in the balancing process.'" ***Id.*** at 75 (quoted source omitted). Thus, "'[o]nce guilt has been established in the first instance the balance between the interests of the individual and those of society shift proportionately.'" ***Id.*** (quoted source omitted). Under this framework, we are reluctant to conclude that a defendant has shown a violation of the right to a speedy sentencing absent a showing of prejudice. ***Id.*** at 77. "'In fact, it might be said that once a defendant has been convicted it would be the rarest of circumstances in which the right to a speedy trial could be infringed without a showing of prejudice. Moreover, the necessity of showing substantial prejudice would dominate the four-part balancing test.'" ***Id.*** at 77-78 (quoted source omitted).

Here, Sullivan's claim of prejudice is based entirely on the length of the delay and that it was caused by the State's negligence. Sullivan contends that, under ***Hadley***, the seven-and-a-half-year delay caused by the State was necessarily prejudicial as a matter of law. We disagree. ***Hadley*** involved a pretrial delay, *see* ***Hadley***, 66 Wis. 2d at 353, and thus the primary interests of the defendant were: (1) "to prevent oppressive pretrial incarceration"; (2) "to minimize anxiety and concern of the accused"; and (3) "to limit the possibility that the defense will be impaired," *see* ***Barker***, 407 U.S. at 532. ***Hadley*** held that most of those interests are prejudiced by pretrial delay "as a matter of law whenever the delay, not the result of the defendant's conduct, is

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revoked. Specifically, the delay occurred between the time that the State moved to revoke Sullivan's deferred prosecution agreement and the time that the State pursued the motion to revoke and sentencing. Sullivan argues that his speedy trial right was implicated by the delay because the right applies "through the sentencing phase of prosecution." *See* ***State v. Allen***, 179 Wis. 2d 67, 72, 505 N.W.2d 801 (Ct. App. 1993). The State applies ***Allen***'s speedy trial analysis for post-verdict speedy trial claims, and Sullivan does not dispute that the ***Allen*** analysis applies in this case. Thus, it appears that the parties agree that this case is more akin to the post-verdict scenario addressed in ***Allen*** than to the standard pretrial speedy trial claim. We agree that the ***Allen*** analysis is applicable in this case.

excessive." ***Hadley***, 66 Wis. 2d at 364. Because the delay in this case occurred after Sullivan entered his no contest plea, "the traditional interests that the speedy trial guarantees are to protect [had] diminish[ed] or disappear[ed]." *See* ***Allen***, 179 Wis. 2d at 78. Thus, unlike in a pretrial claim of a speedy trial violation, "'the prejudice claimed by [a defendant awaiting sentencing] must be substantial and demonstrable. We … evaluate [a] defendant's claims of prejudice … in the context of his status as a convicted felon, not as an accused person awaiting trial.'" ***Id.*** (quoted source omitted). We conclude that Sullivan's claim of prejudice "do[es] not amount to the 'substantial and demonstrable' prejudice needed to support" his speedy trial claim. *See* ***id.*** Because the absence of prejudice outweighs the other factors, we reject Sullivan's claim of a violation of his constitutional right to a speedy trial.

IT IS ORDERED that the judgment of conviction is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals