COURT OF APPEALS
DECISION
DATED AND FILED

August 19, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2046-CR **Cir. Ct. No. 00CF000100**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL MARKS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jackson County: ROBERT W. WING, Judge. *Affirmed*.

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Michael Marks appeals a judgment convicting him of battery by a prisoner and an order denying his postconviction motion. He claims his double jeopardy, speedy trial, and due process rights were violated when the State refiled charges that had previously been dismissed. We affirm for the reasons discussed below.

BACKGROUND

¶2 The State initially filed a criminal complaint charging Marks with battery by a prisoner in March of 1999. Marks made a request for a speedy disposition of the case under the Intrastate Detainer Act, WIS. STAT. § 971.11(7) (2001-02).[1] The request was received by the district attorney's office on July 28, 1999, setting a deadline for trial of November 25, 1999. After the State failed to bring the matter to trial within the specified time, the trial court dismissed the matter without prejudice.

¶3 Nearly a year later, after Marks had been released from prison, the State refiled the charges. Marks moved to dismiss, and the motion was denied. The case proceeded to trial, Marks was convicted in September of 2002, and this appeal followed.

DISCUSSION

Dismissal of Prior Charge Without Prejudice

¶4 Marks contends that the second prosecution was improper because the first case should have been dismissed with prejudice under the test set forth in ***State v. Davis***, 2001 WI 136, 248 Wis. 2d 986, 637 N.W.2d 62. He further claims that, if the first case had been properly dismissed with prejudice, the second case would have been barred by the double jeopardy clauses of the United States and Wisconsin Constitutions. *See* U.S. CONST. amend. V; WIS. CONST. art. I, § 8(1).

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

¶5 Addressing the second contention first, we note that whether a defendant may be retried without violating his or her right to be free from double jeopardy is a question of law subject to de novo review. ***State v. Henning***, 2004 WI 89, ¶14, ___ Wis. 2d ___, 681 N.W.2d 871. In determining whether a double jeopardy violation has occurred, the determinative moment is that at which jeopardy attaches, for that is "the lynchpin for all double jeopardy jurisprudence." ***Crist v. Bretz***, 437 U.S. 28, 38 (1978). WISCONSIN STAT. § 972.07 provides that jeopardy attaches: (1) when a witness is sworn in at trial to the court without a jury, or (2) when the selection of the jury has been completed and the jury sworn in a jury trial. *See also* ***State v. Comstock***, 168 Wis. 2d 915, 937, 485 N.W.2d 354 (1992). Accordingly, Wisconsin courts have held that the dismissal of a case for lack of jurisdiction or for procedural or statutory violations prior to the attachment of jeopardy does not bar subsequent prosecution on double jeopardy grounds. *See* ***State v. Banks***, 105 Wis. 2d 32, 43-44, 313 N.W.2d 67 (1981); ***State v. Fish***, 20 Wis. 2d 431, 434-35, 122 N.W.2d 381 (1963).

¶6 The State correctly points out that the dismissal of the initial case against Marks occurred prior to the swearing in of any juror or witness. We therefore conclude that jeopardy had not attached and any subsequent prosecution was not barred on double jeopardy grounds.

¶7 The only situation in which Wisconsin courts have recognized that dismissal with prejudice is constitutionally required prior to the attachment of jeopardy is when a speedy trial violation has occurred. *See* ***State v. Braunsdorf***, 98 Wis. 2d 569, 575, 297 N.W.2d 808 (1980) (noting that power to dismiss with prejudice is "implicit in the speedy trial guarantee"). Unlike a constitutional speedy trial violation, however, dismissal under the intrastate detainer statute is statutory in nature. *See* ***Davis***, 248 Wis. 2d 986, ¶3 n.2 (noting that dismissal of a

case under the intrastate detainer statute prior to the attachment of jeopardy did "not involve any constitutional issues"). We therefore conclude that Marks has also failed to establish a constitutional basis entitling him to a dismissal with prejudice on the initial case.

¶8 That leaves only Marks' argument that the trial court erred in the exercise of its statutory discretion to dismiss his first case without prejudice. Even assuming that we have the power to review the trial court's exercise of decision in the prior case on this appeal,[2] we would not overturn the trial court's decision.

¶9 When the Intrastate Detainer Act is violated, the trial court has discretion to determine whether the ensuing dismissal should be with or without prejudice. ***Davis***, 248 Wis. 2d 986, ¶5. In deciding whether prejudice should attach, the trial court should consider such factors as the length and reasons for the delay; whether the nature of the case makes it unreasonable to expect adequate preparation by the State within 120 days; any conduct by the accused contributing to the delay; any waiver by the accused of the right to prompt disposition; any harm to the accused, such as anxiety caused by the delay; the delay's effect on the accused's legal defenses; the delay's affect on the programs and movement within the institution available to the accused; the delay's effect on the orderly rehabilitation process of the accused with the Department of Corrections; the delay's effect on an accused's concurrent sentencing possibilities; the delay's effect on the accused's possible transfer to a less secure facility; the delay's effect on the accused's opportunity for parole; the delay's effect on the transfer of the

[2] We note that Marks did not appeal the issue of prejudice from the dismissal order and has not explained on what basis he may now collaterally attack that decision in this appeal. However, because the State does not object, we will address the issue.

accused to another institution; the delay's effect on the public interest in the prompt prosecution of the crime; and the effect of the delay and dismissal on the victim. ***Id.***, ¶29.

¶10 The trial court dismissed the initial charge in this case before the ***Davis*** decision was issued. Therefore, neither party produced evidence or argument relating to many of the factors cited in ***Davis***, and the trial court decided to dismiss without prejudice under the erroneous impression that it was required to do so because the statute did not specify dismissal was to be with prejudice. Even if a trial court has relied upon the wrong rationale, however, we may affirm a decision if we can determine for ourselves that the facts of record provide a basis for it. ***State v. Gray***, 225 Wis. 2d 39, 51, 590 N.W.2d 918 (1999). We are persuaded that is the case here.

¶11 There were a few factors weighing in favor of dismissal with prejudice. Specifically, the nature of the case was not so complex as to require more than the allotted time; the State did not adequately explain why the initial appearance was not held until four months after the complaint had been filed; Marks did not himself contribute to the delay by requesting any extensions or continuances; and the delay did reduce the possibility that Marks could get a concurrent sentence.

¶12 On the other hand, it appears that one of the main reasons for the length of the delay was that the case had to be reassigned to another county after the initial judge recused himself due to a conflict of interest. This was not the defendant's fault, but neither was it attributable to the prosecution. Moreover, while Marks may not have been obligated to bring his prompt disposition request to the trial court's attention, his participation in a pretrial conference without

mentioning the request after the deadline had already passed certainly weighs against him, even if the trial court did not initially make a waiver determination on that basis as permitted under ***State v. Brown***, 118 Wis. 2d 377, 386, 348 N.W.2d 593 (Ct. App. 1984). Marks did not allege any specific harm he would suffer from the delay and made no showing that the delay would prejudice his ability to defend himself. Nor, given that his mandatory release date was September 18, 2000, was the delay likely to have any significant impact on the programs available to him in prison, his movement within prison, his rehabilitation process, his transfer to another institution, or opportunity for parole. There was also no reason to believe that dismissal without prejudice would be contrary to the public interest or would negatively affect the victim. On balance, then, we are satisfied that there were sufficient factors favoring dismissal without prejudice to support the trial court's determination.

Speedy Trial

¶13 The United States and Wisconsin Constitutions each guarantee a criminal defendant the right to a speedy trial. U.S. CONST. amends. VI and XIV; WIS. CONST. art. I, § 7. The test to determine whether a speedy trial violation has occurred requires balancing several factors on a case-by-case basis: (1) the length of the delay, (2) the reason for the delay; (3) the defendant's assertion of the right; and (4) prejudice to the defendant. ***Barker v. Wingo***, 407 U.S. 514, 530 (1972); ***Day v. State***, 61 Wis. 2d 236, 244, 212 N.W.2d 489 (1973). When reviewing speedy trial claims, we apply the clearly erroneous standard to the facts found by the trial court and independently determine whether the constitutional standard has been violated. ***State v. Leighton***, 2000 WI App 156, ¶5, 237 Wis. 2d 709, 616 N.W.2d 126.

¶14 The length of the pretrial delay has been described as a "triggering mechanism" for engaging the speedy trial analysis. ***State v. Borhegyi***, 222 Wis. 2d 506, 510, 588 N.W.2d 89 (Ct. App. 1998). Unless the length of the delay was presumptively prejudicial, it is unnecessary to inquire into the other factors. ***Barker***, 407 U.S. at 530. The parties dispute whether the period between when the initial charge was dismissed and the time it was refiled should be included in the length of delay for the purposes of our analysis. *See* ***United States v. MacDonald***, 456 U.S. 1, 10 (1982) (excluding time between dismissal of military charges and refiling of civilian charges from the speedy trial analysis). It is unnecessary for us to resolve that dispute here, however, because it does not affect our ultimate determination. First, we conclude that even the twenty-one months between the refiling of the charge and the trial qualifies as a presumptively prejudicial period of delay. *See* ***Green v. State***, 75 Wis. 2d 631, 636, 250 N.W.2d 305 (1977) (holding a delay of nearly a year between the preliminary examination and trial was presumptively prejudicial). We therefore proceed to examine the other factors.

¶15 Different reasons for delay should be given different weights.

> A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. 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. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Barker, 407 U.S. at 531 (footnote omitted). Here, the delay was the result of multiple factors, some of which could be attributed in some degree to the State before the refiling, but most of which could be attributed to Marks after the

refiling (due, for instance, to his repeated requests for a new attorney). We see nothing in the record indicating that the State had any intent to deliberately impede the defense or other improper motive for the delay, and the trial court made no such finding. Therefore, we will treat the length and reasons for the delay as weighing against the State, but only mildly.

¶16 "The defendant's assertion of his speedy trial right … is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right … [while] that failure to assert the right will make it difficult to prove that he was denied a speedy trial." ***Barker***, 407 U.S. at 531-32. Here, Marks initially requested a speedy disposition of the charge pursuant to the Intrastate Detainer Act. He did not, however, make any renewed speedy trial demand after the charge was refiled. He claims that he had no need to make a new demand, because the original detainer request acted as an ongoing speedy trial demand. We are not persuaded. To begin with, the speedy trial statute, WIS. STAT. § 971.10(2), provides that trial shall commence within ninety days of a demand made in writing or on the record. A speedy disposition request is addressed to the district attorney, not the court. WIS. STAT. § 971.11(1). Moreover, if a speedy disposition request under the Intrastate Detainer Act also acted as a speedy trial demand, every detainer case would need to be tried within ninety days, rather than the 120 days specified in the detainer statute. We therefore conclude that a speedy disposition request under the Intrastate Detainer Act does not also constitute a speedy trial demand under § 971.10(2). Accordingly, we consider the fact that Marks failed to make a speedy trial demand after the refiling of the charge to weigh heavily against his speedy trial claim.

¶17 Finally, we consider the lack of demonstrated prejudice to Marks to be the deciding factor against him. Marks does not identify any witnesses who

were no longer available by the time the case was tried or other evidence that he would have been able to present if the matter had been tried sooner. We therefore agree with the trial court's conclusion that Marks failed to establish a speedy trial violation.

Due Process

¶18 Finally, Marks contends his due process rights were violated when the trial court effectively authorized further delay in his prosecution by suggesting that the State could refile once Marks was out of prison. Prosecutorial delay in charging may violate due process if: (1) the delay arose from an improper purpose, so as to afford the State a tactical advantage, and (2) the defendant suffered actual prejudice as a result of the delay. ***State v. Peters***, 2000 WI App 154, ¶8, 237 Wis. 2d 741, 615 N.W.2d 655. Here, Marks asserts that the reason the State delayed refiling was to conform to the trial court's mistaken view that the State could not refile while Marks was still in prison after having violated the detainer statute. It is difficult to see how attempting to conform to the trial court's suggestion, even if erroneous, would constitute an improper purpose to the State's tactical advantage in ultimately trying the case. In any event, as we have already discussed, Marks has failed to demonstrate that he suffered any actual prejudice. We therefore reject his due process claim based on prosecutorial delay in recharging.

By the Court.—Judgment and order affirmed.

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