COURT OF APPEALS
DECISION
DATED AND FILED

August 29, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP171-CR **Cir. Ct. No. 2006CM3092**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JESSICA JEAN KACHUR,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Reversed and cause remanded with directions.*

¶1 ANDERSON, P.J.[1] The State of Wisconsin appeals from a judgment dismissing with prejudice a criminal misdemeanor charge against

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Jessica Jean Kachur. The State argues that the trial court erred because it did not have the authority to dismiss with prejudice given that there was neither a constitutional speedy trial violation nor a statutory basis for dismissal with prejudice. We hold that the trial court erroneously reasoned that it had statutory authority to dismiss with prejudice when the record before it precluded statutory application. It erred in not conducting a constitutional speedy trial analysis which would have revealed that no speedy trial violation occurred. Dismissal with prejudice was not rational under the facts of this case. *See* ***State v. Davis***, 2001 WI 136, ¶28, 248 Wis. 2d 986, 637 N.W. 2d 62 ("An erroneous exercise of discretion occurs when the circuit court … does not reason its way to a rational conclusion."). We reverse and remand the cause to the trial court to exercise its discretion consistent with this court's elucidation.

Facts

¶2 This case came after a student at Case High School, in Racine Wisconsin, complained to the police that his teacher, Jessica Jean Kachur, slapped him in the face without provocation prior to his eighth hour class on April 27, 2006. A supplemental police investigation on May 8, 2006, revealed that Kachur admitted to one of the principals at Case High School that she slapped the student because she felt that he was in her personal space and was mocking her.

¶3 On May 19, 2006, the State issued a forfeiture proceeding for an ordinance violation of disorderly conduct. Kachur pled not guilty to the ordinance violation and the State subsequently dismissed the ordinance violation on August 18, 2006.

¶4 On October 2, 2006, the State filed a criminal misdemeanor charge of disorderly conduct against Kachur pursuant to WIS. STAT. § 947.01. On October 5, 2006, Kachur made her initial appearance whereby a status conference was scheduled for October 17, 2006. The status conference resulted in an agreed upon trial date being set for December 7, 2006. Thereafter, due to scheduling conflicts, both parties agreed to set a new trial date of December 14, 2006. On December 12, 2006, the State filed a motion for admission of evidence of other acts. The morning of the motion hearing, December 13, 2006, the State filed a motion to include more witnesses. At the motion hearing, the State requested inclusion of three additional trial witnesses. At this hearing, it came to light that the district attorney assigned to the case had it "dumped on him at the last minute." He stated that when he got the file:

> I read it, I requested a further investigation after contacting the alleged victim in the case. [The victim] provided some other eye witnesses. As soon as I was provided the names I contacted defense counsel and let him know that I'm going to have an investigator contact these people. I told him that … as soon as I got the report back from the investigator, that I would fax it over to him. I received it this morning…. [B]efore I even came over to court this morning is when I faxed it over.

¶5 The trial court responded:

> [M]y sympathies go to the State; overworked, not underpaid but an impossible situation with the way we run things around here. Not your fault. It's the fault of the agency that prepares the reports….
>
> You, Mr. [Prosecutor] suspect there's other things out there. You ask for information. Lo and behold they do some further investigation, there is stuff that you believe is relevant. You performed absolutely correctly but too late. I mean that's all this boils down to in my view.

The trial court denied all requests made by the State.

¶6 The next day, the State requested a one week adjournment explaining that, in light of court's ruling at the motion hearing, there was not enough evidence to convict Kachur. The State further stated that if the adjournment was not granted, it would have no choice but to dismiss and reissue the charges against Kachur. The trial court specifically noted: "[T]his isn't the District Attorney's fault for a lot of reasons…. I hesitate to say it's anybody's fault. This may be the system we're faced with with the inadequate resources available." The trial court denied the State's adjournment request. The trial court stated that it "follow[ed] the rationale contained in [***State v. Davis***, 248 Wis. 2d 986, ¶34]" and that Kachur "is entitled to the same considerations with regards to a prompt trial under the statutes." The court then dismissed the case with prejudice.

¶7 On appeal, the State argues that the trial court does not have the authority to dismiss a criminal charge with prejudice unless there is a constitutional speedy trial violation or dismissal is pursuant to statute. The State asserts that the district attorney has discretion in choosing which criminal cases are pursued. The State additionally asserts that the trial court lacked a finding that Kachur's speedy trial right was implicated and that the trial court's remedy of dismissal with prejudice has no basis under WIS. STAT. §§ 971.10 or 971.11 and thus was in error.

Law

¶8 "A reviewing court will affirm a discretionary decision by a circuit court so long as the circuit court did not erroneously exercise its discretion." ***Davis***, 248 Wis. 2d 986, ¶28. "An erroneous exercise of discretion results when the exercise of discretion is based on an error of law." ***Id.*** In exercising its

discretion, the trial court must consider the facts of record under the relevant law and reason its way to a rational conclusion. ***Id.*** We review questions of law de novo. ***State v. Ziegenhagen***, 73 Wis. 2d 656, 664, 245 N.W. 2d 656 (1976).

¶9 A district attorney is granted wide discretion to initiate criminal proceedings. ***State v. Braunsdorf***, 98 Wis. 2d 569, 572-73, 297 N.W. 2d 808 (1980). However, there is a limit to the district attorney's discretion in that the trial court has authority to dismiss a criminal case with prejudice prior to the attachment of jeopardy when a defendant's constitutional speedy trial right is violated. *See* ***id.*** at 578. Additionally, the trial court has specifically delineated statutory authority to dismiss with prejudice. *See* WIS. STAT. § 971.11; *see also* ***Davis***, 248 Wis. 2d 986, ¶5.

¶10 WISCONSIN STAT. § 971.10 pertains to statutory speedy trial rights and provides in part: "(1) In misdemeanor actions trial shall commence within 60 days from the date of the defendant's initial appearance in court."

¶11 WISCONSIN STAT. § 971.11 pertains to "Prompt disposition of intrastate detainers" and governs any "untried criminal case pending in this state against an inmate of a state prison."

Discussion

¶12 The trial court erroneously exercised its discretion because it acted based on an error of law. *See* ***Davis***, 248 Wis. 2d 986, ¶ 28. Statutory authority to dismiss with prejudice is record-reliant and is not meant to grant unfettered authority to the trial court whenever a speedy trial challenge occurs. Here, the trial court erroneously applied the "the statutes" and thus, erroneously looked to the statutory rationale in ***Davis***. *See* ***Davis***, 248 Wis. 2d 986, ¶¶3, 5. ***Davis*** is a

statutorily-driven decision which established that, under WIS. STAT. § 971.11, Wisconsin's "Prompt disposition of intrastate detainers" statute, a trial court has the authority to dismiss a case with or without prejudice.[2] *See* ***Davis***, 248 Wis. 2d 986, ¶5. Section 971.11 addresses detainee rights (i.e., prisoner rights) and simply does not apply to Kachur, who was not incarcerated.

¶13 Kachur nonetheless asserts that the trial court was not in error in following the rationale in ***Davis*** and that its decision must be upheld under WIS. STAT. § 971.10, Wisconsin's "Speedy trial" statute, since her trial did not take place within the statutory parameter. Section 971.10 sets forth a sixty-day parameter for commencement of trial after the defendant's initial appearance in court. Sec. 971.10(1). Markedly, it is this sixty-day parameter that makes § 971.10 inapplicable under the facts of this case. The record demonstrates that both parties agreed to a trial date *beyond* the sixty-day parameter set down in § 971.10. Thus, upon this record, the trial court's authority to act was not statutory. Instead, in order to consider dismissal with prejudice, the trial court was obligated to look to Kachur's constitutional right to a speedy trial and to determine, after proper analysis, whether it was violated.

¶14 We therefore turn to a constitutional speedy trial analysis and in so doing provide direction in the remainder of the opinion for the considerations that

[2] ***State v. Davis***, 2001 WI 136, 248 Wis. 2d 986, 637 N.W. 2d 62, dealt with two questions of law under Wisconsin's intrastate detainer statute: first, "does WIS. STAT. § 971.11(7) grant a circuit court the discretion to dismiss a criminal case with or without prejudice when the State fails to bring the criminal case on for trial within the 120-day time period set forth in § 971.11(2)?" and, second, "if § 971.11(7) does grant a circuit court the discretion to dismiss a criminal case with or without prejudice when the State fails to bring the criminal case on for trial within the 120-day time period set forth in § 971.11(2), did the circuit court in the present case properly exercise its discretion in dismissing the criminal case against the defendant with prejudice?" ***Davis***, 248 Wis. 2d 986, ¶3.

should have been analyzed. A trial court is required to make considerations of certain factors and to reason its way to its conclusion. *See* ***Braunsdorf***, 98 Wis. 2d at 574; ***Davis***, 248 Wis. 2d 986, ¶28.

¶15 A defendant's constitutional right to speedy trial is based on a "totality of circumstances that exist in any specific case" and should be determined on an ad hoc balancing basis. *See* ***State v. Borhegyi***, 222 Wis. 2d 506, 509, 588 N.W. 2d 89 (Ct. App. 1998); ***Barker v. Wingo***, 407 U.S. 514, 530 (1972).[3] There are at least four factors to examine when balancing a defendant's right to speedy trial: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of his or her right to speedy trial, and (4) prejudice to the defendant. ***Barker***, 407 U.S. at 530; ***Day v. State***, 61 Wis. 2d 236, 244, 212 N.W.2d 489 (1973).

¶16 LENGTH OF DELAY: The length of delay factor is a "triggering mechanism." ***Barker***, 407 U.S. at 530. To determine whether to examine the other factors of the speedy trial analysis, the length of delay must be "so inordinate as to be presumptively prejudicial." ***State v. Mullis***, 81 Wis. 2d 454, 459, 260 N.W.2d 696 (1977). Thus, if the length of delay is not considered so inordinate to be presumptively prejudicial, the speedy trial analysis ends and no further inquiries into the other factors are necessary.

¶17 The speedy trial calculation begins once a defendant "in some way formally becomes the accused," which can be at the time of arrest or when the complaint and warrant are issued. *See* ***Borhegyi***, 222 Wis. 2d at 510-11 (citation omitted). Kachur argues that the length of delay calculation should begin when

[3] Adopted by the Wisconsin Supreme Court in ***Day v. State***, 61 Wis. 2d 236, 242, 212 N.W.2d 489, 493 (1973).

she was first charged with the ordinance violation of disorderly conduct. This charge was a forfeiture proceeding; it was dropped and was distinct from the criminal charge. Kachur was first charged with a criminal violation on October 2, 2006, pursuant to WIS. STAT. § 947.01 and, therefore, the length of delay determination is properly calculated from the date of Kachur's criminal charge. Kachur agreed to a trial date sixty-seven days from the date of her criminal charge and again agreed to a newly set trial date seventy-three days from the time she was charged.

¶18 When the length of delay approaches one year, it is generally considered presumptively prejudicial. *See* ***Borhegyi***, 222 Wis. 2d at 510. The length of time between Kachur's criminal charge and her trial date did not come close to approaching this one year benchmark. Moreover, Kachur agreed to her initial trial date and the subsequent rescheduled trial date. Thus, she agreed to a length of delay of sixty-seven or seventy-three days. The agreed-upon length of delay hardly rises to the level of "so inordinate as to be presumptively prejudicial." *See* ***Mullis***, 81 Wis. 2d at 459. This decided, the analysis could end here with the conclusion that Kachur's speedy trial rights were not violated. *See* ***Barker***, 407 U.S. at 530; *see also* ***Mullis***, 81 Wis. 2d at 459. We nonetheless address the other factors for instructive purposes.

¶19 REASON FOR THE DELAY: If it is determined that the length of delay has triggered a further look into the speedy trial analysis, another factor in determining whether there was a violation of one's speedy trial right is the reason for the delay. ***Barker***, 407 U.S. at 531. In determining whether the reason for delay amounts to a constitutional violation of a defendant's speedy trial right "different weights should be assigned to different reasons." ***Id.*** If there is a deliberate attempt to delay trial in order to disadvantage a defense, the court

should weigh this evidence more heavily against the government than negligence or overcrowding. ***Id.*** The government's failure to explain substantial delay goes beyond negligence and shows a cavalier disregard for the defendant's right to a speedy trial. *See* ***Borhegyi***, 222 Wis. 2d at 513.

¶20 In ***Ziegenhagen***, negligence of the state and the state's supporting agencies in aiding the prosecuting attorney were considered in the speedy trial analysis. ***Ziegenhagen***, 73 Wis. 2d at 666-67. The court found that the delay was occasioned by negligence in the office of the prosecutor as well as by its supporting agencies. ***Id.*** at 667. Like ***Ziegenhagen***, the trial court here faulted the supporting agencies stating that it may be the "inadequate resources available" to the prosecution that were to blame for any lack of promptness. However, unlike ***Ziegenhagen***, the trial court did not fault the prosecutor's office specifically. Rather, the trial court expressly noted: "[T]his isn't the district attorney's fault for a lot of reasons."

¶21 Thus, the State does not appear to have shown a cavalier disregard for Kachur's rights. The State explained that the victim only later informed it of other eyewitnesses to the incident and given this new information, the State requested a supplemental investigation. The State further explained it was prompt in disclosing the reports from the supplemental investigation because, as soon as the State received the reports, it faxed the reports to Kachur's defense counsel. The State subsequently asked for an adjournment of one week to complete its case against Kachur.

¶22 ASSERTION OF RIGHT TO SPEEDY TRIAL: In analyzing whether a defendant's right to speedy trial has been impinged upon, whether a defendant has asserted that right is to be taken under consideration. ***Barker***, 407 U.S. at 528

(emphasizing that "failure to assert the right will make it difficult for a defendant to prove that he [or she] was denied a speedy trial"). A demand for a speedy trial made by the defendant is "probative of the fact that the delay was not occasioned by the defendant and that the defendant was subjectively of the opinion that he [or she] was being prejudiced by the lack of speedy trial." ***Ziegenhagen***, 73 Wis. 2d at 668. A defendant's failure to assert the right to a speedy trial does not create the presumption that the defendant has waived the right; however, the failure to make such assertion may be weighed against the defendant. ***Barker***, 407 U.S. at 528; ***Day***, 61 Wis. 2d at 245-46; ***Ziegenhagen***, 73 Wis. 2d at 668.

¶23 Kachur concedes that she did not make a speedy trial demand, but argues that she was not required to do so based upon WIS. STAT. § 971.10. Kachur is correct that § 971.10 does not require a defendant to assert this right. However, as we have already explained, § 971.10 does not apply to Kachur's case because Kachur agreed to a trial date beyond the sixty-day period set out in the statute. Though Kachur's failure to assert her right does not create a presumption of waiver, it does create difficulties in proof of a speedy trial violation. *See* ***Barker***, 407 U.S. at 528; ***Day***, 61 Wis. 2d at 245-46; ***Ziegenhagen***, 73 Wis. 2d at 668. Further, it is within the power of this court to weigh the failure to assert her speedy trial right against Kachur. *See* ***Ziegenhagen***, 73 Wis. 2d at 668. Kachur's lack of assertion of a speedy trial right, coupled with her agreement to her trial date, creates a high hurdle, which Kachur's proof does not overcome. *See* ***Barker***, 407 U. S. at 532.

¶24 PREJUDICIAL EFFECT OF DELAY ON DEFENDANT: The determination of prejudice resulting from the delay of a trial is measured against at least three interests to which a speedy trial is supposed to protect: (1) prevention of oppressive pretrial incarceration, (2) prevention of anxiety and concern by the

accused, and (3) prevention of impairment of a defense. ***Barker***, 407 U.S. at 532; ***Ziegenhagen***, 73 Wis. 2d at 671.

¶25 The first interest, prevention of oppressive pretrial incarceration, does not apply because Kachur was not incarcerated. The third interest, prevention of impairment of her defense, has not been claimed by Kachur and the record does not reveal impairment.

¶26 This leaves the second interest, prevention of stress and anxiety. Kachur claims to have "endured significant stress and anxiety" given that she took "five full days off from work" and "incurred attorney fees." Kachur may have endured some stress and anxiety over the pending criminal charges, but she cannot be said to have suffered prejudice that rises to the level of a constitutional violation. An example of the type of constitutional violation contemplated was found in ***Borhegyi*** where an incarcerated defendant waited seventeen months between his arrest and trial. ***Borhegyi***, 222 Wis. 2d at 512. The court found that the seventeen-month incarceration between the defendant's arrest and trial was enough to satisfy a minimal prejudice standard. ***Id.*** The court reasoned that "some anxiety existed based upon the extended period of time lapsing between [the defendant's] arrest and the actual trial." ***Id.*** at 515.

¶27 Like ***Borehgyi***, Kachur claims to have suffered stress and anxiety over her pending trial. It seems quite reasonable to assume that there may be some discomfort, anxiety and concern whenever there is pending litigation, especially pending criminal litigation. However, unlike ***Borhegyi***, Kachur has not been incarcerated. Additionally, unlike ***Borhegyi***, Kachur does not claim that her defense has been impaired. Here, the record does not reveal that Kachur's stress and anxiety amount to a constitutional violation.

¶28 In summary, Kachur agreed to a trial date beyond the limits of WIS. STAT. § 971.10 and subsequently is subject to a constitutional speedy trial analysis. Accordingly, while the trial court is correct in recognizing its authority to dismiss a criminal misdemeanor with prejudice, it failed to consider the relevant factors that must be considered in a constitutional speedy trial analysis. Furthermore, under a proper consideration of the constitutional speedy trial factors, Kachur's right to a speedy trial was not violated. The length of delay between trial and charge was not "so inordinate" to be "presumptively prejudicial." *See* ***Mullis***, 81 Wis. 2d at 459. The State's reason for delay does not emanate bad faith. Kachur, in not asserting her right to speedy trial, makes it more difficult to prove a violation and the proof presented by Kachur fails to rise to such a level. Finally, Kachur may have suffered some stress and anxiety because of the delay in trial; however, the level of stress and anxiety suffered in this case is not in itself a constitutional violation.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT RULE 809.23(1)(b)4.