**COURT OF APPEALS DECISION DATED AND FILED**

**July 29, 2009**

**David R. Schanker**
**Clerk of Court of Appeals**

**NOTICE**

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

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

**Appeal No. 2009AP365-CR**

**Cir. Ct. No. 1998CM1709**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS**
**DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DERRICK HOWARD,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Racine County: RICHARD J. KREUL, Judge. *Reversed*.

¶1 SNYDER, J.[1] Derrick Howard appeals from a judgment of conviction for contempt of court contrary to WIS. STAT. § 785.04(2). Howard

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(h) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

complains that the State denied him his constitutional right to a speedy trial, the trial court erred in admitting evidence of his status as a co-defendant in a prior homicide case, and the court wrongly denied his mistrial motion when the jury heard certain testimony concerning the prior homicide case presented in violation of the trial court's pretrial order. We reverse the judgment of conviction.

¶2 In 1998, Howard and Lorenzo Johnson were charged as co-defendants in a first-degree intentional homicide. Howard agreed to testify against co-defendant Johnson, entered a plea of guilty to reduced charges,[2] and was sentenced to forty-five years in prison prior to Johnson's trial. The prosecution subpoenaed Howard to testify against Johnson at Johnson's first-degree intentional homicide trial in June 1998. The trial court granted Howard immunity and ordered Howard to testify. Howard provided his name and acknowledged that he was acquainted with Johnson, and then refused to answer any further questions. On July 21, 1998, Howard was charged with one count of contempt of court alleging that Howard violated a court order to testify at Johnson's jury trial. An initial appearance was scheduled for July 30, 1998.

¶3 On July 11, 1998, prior to his initial appearance date, Howard was transferred to an Oklahoma prison. A warrant was issued on August 3, 1998, and cancelled on September 11, 2007. Howard was returned to the Wisconsin prison system in 2002. Because the Racine County District Attorney (DA) was not notified of Howard's return to Wisconsin, the case lay dormant until August 21, 2007, when Howard sent a letter to the DA requesting that the pending contempt

[2] Howard entered pleas to five counts of recklessly endangering safety in lieu of first-degree intentional homicide.

charge be dismissed or resolved within ninety days.[3] The DA responded by reinitiating prosecution with an initial appearance occurring on September 11, 2007. On October 24, 2007, Howard filed a motion to dismiss on grounds his constitutional right to a speedy trial was violated. The trial court denied the motion to dismiss and the matter proceeded to a jury trial. Howard was convicted of the contempt charge on June 25, 2008.

¶4 We first address Howard's delay of trial claim. Howard seeks reversal and dismissal of the judgment of conviction, with prejudice, due to the denial of his constitutional right to a speedy disposition of the contempt charge. WISCONSIN CONST. art I, §7, and the Sixth Amendment of the United States Constitution provide an accused with the right to a speedy trial. This right is triggered with the initial step of the criminal prosecution, i.e., the filing of the complaint and warrant. ***State v. Lemay***, 155 Wis. 2d 202, 210, 455 N.W.2d 233 (1990). Whether Howard has been denied his constitutional right to a speedy trial presents a question of law, which we review de novo, while accepting the findings of fact made by the trial court unless they are clearly erroneous. *See* ***State v. Leighton***, 2000 WI App 156, ¶5, 237 Wis. 2d 709, 616 N.W.2d 126.

¶5 Howard contends that the extent of the delay between the complaint filing and his initial appearance violated his constitutional right to a speedy trial.[4] The contempt of court complaint was filed on July 21, 1998, and Howard's initial

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[3] It is undisputed that Howard sent, and the DA received, a letter dated August 21, 2007, concerning the pending contempt charge. However, the letter is not in the appellate record nor was it filed as a formal motion for relief in the trial court.

[4] Howard did not file a motion concerning, nor does he raise an issue about, his statutory right to a speedy trial under WIS. STAT. § 971.10, which would invoke Howard's right to discharge from custody while awaiting trial on a misdemeanor charge.

appearance in response to the complaint was on September 11, 2007, over nine years later. The mere lapse of time, however, is not necessarily grounds for dismissal for want of a speedy trial. ***State v. Ziegenhagen***, 73 Wis. 2d 656, 665, 245 N.W.2d 656 (1976) (*citing* ***Barker v. Wingo***, 407 U.S. 514 (1972) (where defendant was not tried for over five years, other factors resulted in the matter not being dismissed for want of a speedy trial)). Our supreme court has declined to implement a specific period of time as a standard upon which to determine whether or not the right to a speedy trial has been denied. ***Ziegenhagen***, 73 Wis. 2d at 665.

¶6 In addressing Howard's constitutional right to a speedy trial four factors are considered: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice to the defendant from the delay. *See* ***id.*** at 664. None of the individual four factors is regarded "as either a necessary or sufficient condition to the finding of a deprivation of the constitutional right of speedy trial." ***Id.*** at 665 (citation omitted). "Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." ***Id.*** (citation omitted).

¶7 Whether the length of delay is "presumptively prejudicial" must be determined before we turn to the remaining factors. ***Hatcher v. State***, 83 Wis. 2d 559, 566-67, 266 N.W.2d 320 (1978). The State concedes that the delay of over nine years was presumptively prejudicial and that the length of the delay weighs against the State. The trial court agreed, holding that a delay of over nine years was excessive and presumptively prejudicial. If the length of the delay is presumptively prejudicial and the court determines that the defendant has been

denied the right to a speedy trial under the totality of the circumstances, the charges must be dismissed. ***Leighton***, 237 Wis. 2d 709, ¶7. Because there is no dispute regarding the prejudicial nature of the delay, we need not address it further, and turn now to the remaining three factors.

¶8 As to the second factor, the reason for the delay, the State concedes that Howard was in the State's custody during the more than nine-year period of delay, and that the State is responsible for the delay. However, the State argues that the second factor should not be weighed heavily against the State because there was no deliberate attempt to delay the trial or to hamper the defense. *See* ***State v. Borhegyi***, 222 Wis. 2d 506, 512, 588 N.W.2d 89 (Ct. App. 1998); ***Green v. State***, 75 Wis. 2d 631, 637, 250 N.W.2d 305 (1977) (holding that "the delay was not intentional or motivated as a device to disadvantage the defendant in the preparation of his defense"). Howard agrees that the State did not "intentionally" delay the matter in order to prejudice his defense, contending instead that the delay points to a "cavalier disregard" for his rights.

¶9 Where a deliberate attempt to delay a case is absent, ***Borhegyi*** recognizes that differing weights are assigned to reasons that may be given for the delay:

> 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 weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.

***Borhegyi***, 222 Wis. 2d at 512 (citation omitted).

¶10 The State contends that the delay in prosecuting the contempt charge was no more than "simple negligence." It emphasizes that Howard was moved to Oklahoma prior to his initial appearance date, Howard remained in the Oklahoma prison system for four years, the DA was not notified when Howard returned to Wisconsin, and the State lacked intent or motive to prejudice or interfere with Howard's right to timely address the contempt charge. Howard responds that the State is wholly responsible for the extensive nine-year delay, and that the delay must be weighed heavily against the State because of its extraordinary length.

¶11 The trial court concluded that nothing in the entire record could be attributed to Howard as a basis or reason for the delay, and that the length of delay was entirely the fault of the State. Further, the trial court specifically held "that the negligence here of the State must be weighed highly against [the State] for such a long length of delay." We agree.

¶12 The third ***Ziegenhagen*** factor addresses whether Howard ever asserted his right to a speedy trial. It is undisputed that Howard did not assert his right to a speedy trial at any time during the more than nine-year delay from the filing of the contempt complaint to his initial appearance. However, a defendant has no duty to bring himself or herself to trial because that is the State's duty. ***State v. Urdahl***, 2005 WI App 191, ¶33, 286 Wis. 2d 476, 704 N.W.2d 324. The failure to assert the right to a speedy trial makes it more difficult for a defendant to prove that he was denied a speedy trial. ***Id***. A defendant's complete failure or delay in demanding a speedy trial will be weighed against him. *See* ***Hipp v. State***, 75 Wis. 2d 621, 628, 250 N.W.2d 299 (1977).

¶13 The State contends that Howard's failure to invoke his right to a speedy trial should be weighed heavily against Howard in the absence of some

extraordinary circumstances. Citing to ***Hadley v. State***, 66 Wis. 2d 350, 225 N.W.2d 461 (1975), Howard responds that failure to invoke his right to a speedy trial is significant only if he intended to delay the resolution of the contempt charge. In ***Hadley*** our supreme court indicated that this factor only concerns cases in which a defendant is "consciously seeking to avoid the day of reckoning." ***Id***. at 361. We agree with Howard that his failure to assert his speedy trial right does not defeat his argument and should have little, if any, weight under these circumstances.

¶14 The fourth factor concerns the prejudice to Howard from the constitutional speedy trial delay. Three interests are considered when addressing the element of prejudice in a speedy trial claim: (1) prevention of oppressive pretrial incarceration; (2) prevention of anxiety and concern by the accused; and (3) prevention of impairment of defense. ***Urdahl***, 286 Wis. 2d 476, ¶34. The first interest, prevention of oppressive pretrial incarceration, is not relevant to Howard because he was incarcerated on the five felony convictions; moreover, this element was not raised or argued in this appeal. We need not address it.

¶15 The second interest concerns Howard's anxiety and concern over the pending charge of contempt. The State indicates that Howard's anxiety and concern during the delay was minimal if not completely lacking. However, it is Howard who actually prompted the resurrection of the case. The State recognized that Howard was eligible for parole on February 23, 2008, and that the pending contempt charge would have potential for Howard's additional incarceration. Howard counters that, as stated in ***Moore v. Arizona***, 414 U.S. 25, 27 (1973), "[N]o court should overlook the possible impact pending charges might have on [a defendant's] prospects for parole and meaningful rehabilitation."

¶16 Howard argues his anxiety and concern over the unresolved contempt charge is demonstrated by his decision to raise the issue in August 2007, six months prior to his parole eligibility date. He contends that he raised the issue of the pending contempt charge because he was approaching his prison parole eligibility date and became anxious and concerned that any unresolved charge would adversely affect his parole. In response, the State contends that it made no difference whether or not the contempt charge was prosecuted in 1998 or nine years later. The trial court did not specifically address this issue. We conclude that the delay occasioned anxiety and concern to Howard and that it is properly weighed against the State when balancing whether Howard suffered prejudice due to the delay.

¶17 The main focus of the trial court's decision denying Howard relief from the constitutional right to a speedy trial was on the remaining interest, the prevention and impairment of Howard's defense. Howard points out that the trial court weighed this consideration heavily against him because the court could not "pinpoint a particular deficiency that would cause the Court to conclude that [Howard] has been prejudiced by the delay."

¶18 In ***Ziegenhagen***, the trial court concluded "that the defendant's defense has been irretrievably impaired" by a two-year delay and dismissed the charge. ***Ziegenhagen***, 73 Wis. 2d at 670. In addition, the ***Ziegenhagen*** court held that a defendant claiming the constitutional deprivation of speedy trial is not required to affirmatively show prejudice. ***Id***. at 672. On the other hand, noting that none of the four factors above is a necessary or sufficient condition to finding that Howard was deprived of his right of speedy trial, the court stated that "there was substantial evidence that [Ziegenhagen's] ability to defend himself was in fact impaired by the passage of time." ***Id***. at 673.

¶19 Here, the trial court determined that the necessary witnesses would be available for Howard's trial in spite of the excessive passage of time from the filing of the complaint to Howard's initial appearance on the charge and his trial. The court stated:

> And last but not least is the prejudice. It is difficult to determine exactly how [Howard] has been prejudiced by the delay. There is no doubt in this Court's mind that the delay is excessive…. Whether or not memories are impaired, witnesses unavailable for the defense is a matter of some concern obviously. However, the Court can not pinpoint a particular deficiency that would cause the Court to conclude that the defendant has been prejudiced by the delay. That factor may in fact be only determined at a trial situation. And the court notes that as the district attorney said, the witnesses involved in this matter are available to the Court, doesn't appear that there is any particular witness that is not….

¶20 In spite of the trial court's difficulty determining how Howard would be prejudiced by a trial over nine years after the filing of the contempt complaint and its inability to pinpoint a particular deficiency that would prejudice Howard in defending himself, Howard need not show prejudice in fact to evince a speedy trial violation. *See* ***Hadley***, 66 Wis. 2d at 364 ("[N]o burden is placed upon the defendant to show he was prejudiced in fact."). Therefore, the absence of a specific, articulable instance of prejudice does not weigh heavily against Howard.

¶21 Where the length of the delay is excessive and the reason for the delay lies solely with the State, prejudice can exist as a matter of law. "[W]hile … 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." ***Id***.

¶22 The ***Ziegenhagen*** analysis places responsibility for the excessive delay squarely on the State's shoulders. The State's attempt to excuse the delay because Howard was not anxious about the charges or did not file a motion for a speedy trial rings hollow in light of all of the circumstances. We conclude that Howard was denied a speedy trial on the contempt of court charge and that the judgment must be reversed and dismissed with prejudice. *See* ***Urdahl***, 286 Wis. 2d 476, ¶11 ("The only remedy for a violation of the right to a speedy trial is dismissal of the charges.").

¶23 Howard raises additional allegations of evidentiary errors at trial. Because we reverse on grounds he was denied his constitutional right to a speedy trial, we need not address the other appellate issues. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938).

*By the Court.*—Judgment reversed.

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