COURT OF APPEALS
DECISION
DATED AND FILED

May 1, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2010AP2009 **Cir. Ct. No. 2003CI5**

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

IN RE THE COMMITMENT OF JUAN VILLEGAS:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JUAN VILLEGAS,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: THOMAS P. DONEGAN, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Juan Villegas appeals from an order committing him to the Wisconsin Department of Health Services as a sexually violent person. The sole issue presented is whether the delay of six and one-half years between the

date that the State initiated the commitment proceedings and the start of the trial violated his right to a speedy trial and necessitates dismissing the proceedings. We conclude that, under the facts here, Villegas suffered no violation of the right to a speedy trial. We affirm.

BACKGROUND

¶2 On October 28, 2003, the State filed a petition alleging that Villegas was a sexually violent person. *See* WIS. STAT. § 980.02 (2001-02).[1] At that time, he was in prison serving a sentence for second-degree sexual assault and within five days of his mandatory release date. On March 29, 2010, the parties waived the right to a jury trial and began a two-day trial to the court. Villegas remained in State custody throughout the time that the petition was pending.

¶3 At trial, the State presented evidence of Villegas's criminal convictions for sexually violent offenses in Wisconsin and Illinois. The State also presented testimony from two psychologists who diagnosed Villegas with mental disorders and who opined that he was more likely than not to engage in acts of sexual violence in the future.[2] Villegas did not testify, and he presented no evidence. At the conclusion of the trial, the circuit court found that Villegas is a

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

[2] When the State filed the petition underlying this case, a person was sexually violent for purposes of WIS. STAT. ch. 980 if, in addition to other elements, the person was "suffer[ing] from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence." *See* WIS. STAT. § 980.01(7). While the petition in this case was pending, the legislature substituted the word "likely" for the words "substantially probable." *See* 2003 Wis. Act 187, § 2; *see also* ***State v. Tabor***, 2005 WI App 107, ¶3, 282 Wis. 2d 768, 699 N.W.2d 663. The legislature also defined "likely" to mean "more likely than not." 2003 Wis. Act 187, § 1. The provisions of 2003 Wis. Act 187 first applied to trials that began on or after April 22, 2004. *See* ***Tabor***, 282 Wis. 2d 768, ¶2. Accordingly, the provisions applied here.

sexually violent person and committed him to the Department of Health Services for control, care, and treatment. We examine additional facts within the context of resolving the legal issue presented.

DISCUSSION

¶4 The Sixth Amendment to the United States Constitution and article I, § 7 of the Wisconsin Constitution guarantee the right to a speedy trial in criminal prosecutions. Wisconsin courts assess whether a criminal defendant suffered a violation of the right to a speedy trial by conducting the four-factor balancing test set forth in ***Barker v. Wingo***, 407 U.S. 514, 530 (1972). *See* ***Day v. State***, 61 Wis. 2d 236, 244, 212 N.W.2d 489 (1973) (adopting the ***Barker*** test). Villegas claims on appeal that he was denied his right to a speedy trial under the ***Barker*** analysis.

¶5 Proceedings under WIS. STAT. ch. 980 are civil, not criminal. *See* ***State v. Carpenter***, 197 Wis. 2d 252, 258-59, 541 N.W.2d 105 (1995). The parties nonetheless agree that the ***Barker*** analysis applies, referring us to a variety of persuasive State and federal authorities. The State cites ***United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in U.S. Currency***, 461 U.S. 555, 556 (1983) (applying the ***Barker*** analysis to assess delay in filing a civil forfeiture action), and ***State v. Beyer***, 2006 WI 2, ¶¶74, 77-78, 287 Wis. 2d 1, 707 N.W.2d 509 (Roggensack, J., concurring) (indicating that delay in hearing claims by persons seeking release from a chapter 980 commitment is analyzed using the ***Barker*** criteria). Villegas relies on WIS. STAT. § 980.05(1m) (providing that, at a trial to determine whether a person is sexually violent, "[a]ll constitutional rights

available to a defendant in a criminal proceeding are available to the person").[3] We accept the parties' joint position.

¶6 The four-factor ***Barker*** test requires a court to balance: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion or failure to assert the right to a speedy trial; and (4) the prejudice to the defendant arising from the delay. *See* ***id.***, 407 U.S. at 530; *see also* ***State v. Leighton***, 2000 WI App 156, ¶6, 237 Wis. 2d 709, 616 N.W.2d 126. Our review is *de novo*. *See* ***State v. Borhegyi***, 222 Wis. 2d 506, 508, 588 N.W.2d 89 (Ct. App. 1998).

A. Length of Delay.

¶7 The first ***Barker*** factor is a "triggering mechanism." ***Borhegyi***, 222 Wis. 2d at 510. Only if the length of the delay is presumptively prejudicial must we consider the other ***Barker*** factors. ***Borhegyi***, 222 Wis. 2d at 510. Generally, a delay that approaches one year is presumptively prejudicial. ***Id.*** Here, six years, five months, and one day—2344 days—separated the date of the filing of the petition from the start of the trial.[4] Neither party disputes that the delay in this case was presumptively prejudicial. We turn to the remaining ***Barker*** factors.

[3] Effective August 1, 2006, the legislature repealed WIS. STAT. § 980.05(1m), pursuant to 2005 Wis. Act 434, §§ 101, 132. The repeal first applies to trials held pursuant to petitions filed on the effective date of the Act. *See* ***id.***, § 131(1). The State does not challenge Villegas's contention that § 980.05(1m) is applicable here.

[4] As did the parties, we have relied on the website http://www.timeanddate.com to calculate the precise number of days comprising the time periods we discuss.

B. Reasons for Delay.

¶8 The second ***Barker*** factor is the reason or reasons for the delay. *See* ***id.***, 407 U.S. at 530.

> When considering the reasons for the delay, courts first identify the reason for each particular portion of the delay and accord different treatment to each category of reasons. 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. On the other hand, if the delay is caused by something intrinsic to the case, such as witness unavailability, that time period is not counted. Finally, if the delay is caused by the defendant, it is not counted.

State v. Urdahl, 2005 WI App 191, ¶26, 286 Wis. 2d 476, 704 N.W.2d 324 (citations omitted). Thus, we consider only delays attributable to the State when determining whether a defendant suffered a denial of the right to a speedy trial. *See* ***Norwood v. State***, 74 Wis. 2d 343, 354, 246 N.W.2d 801 (1976). The State is responsible for delays caused by the prosecutor and his or her witnesses, for delays caused by a congested circuit court calendar, and for delays caused by lack of judicial manpower. *See* ***Hadley v. State***, 66 Wis. 2d 350, 362-63, 225 N.W.2d 461 (1975). We assess the reasons for the delay in this case as follows.

1. *October 28, 2003, to December 30, 2003: 63 days attributed to the State.*

¶9 During this period, the State filed the petition to declare Villegas a sexually violent person, and Attorneys Robert Peterson and Samantha Humes of the state public defender's office were appointed to represent Villegas. The circuit court conducted a hearing pursuant to WIS. STAT. § 980.04(2), and concluded on November 14, 2003, that probable cause existed to believed that Villegas is a sexually violent person. Villegas waived the forty-five day statutory time limit for

starting the trial, and the parties scheduled a January 2004 status conference. The State concedes responsibility for this period of delay.

2. *December 30, 2003, to May 24, 2004: 146 days attributed to Villegas.*

¶10 On December 30, 2003, Villegas filed a motion to declare WIS. STAT. ch. 980 unconstitutional, and, on March 29, 2004, Villegas filed a motion to dismiss the petition. The circuit court established a briefing schedule for Villegas's motions and set a hearing date of May 24, 2004. Time for the State to oppose a defendant's pretrial motions is "both inevitable and wholly justifiable." *See* ***Doggett v. United States***, 505 U.S. 647, 656 (1992). The delay stemming from defense motions is therefore attributed to Villegas. *See* ***Urdahl***, 286 Wis. 2d 476, ¶26.

3. *May 24, 2004, to June 2, 2004: 9 days attributed to the State.*

¶11 On May 24, 2004, the circuit court adjourned the hearing to address Villegas's motions until June 2, 2004, because the assistant district attorney handling the matter for the State was ill. Illness of a key member of the prosecution's team constitutes a "strong excuse" justifying delay. *See* ***Barker***, 407 U.S. at 533-34. Accordingly, we attribute nine days of delay to the State, but, because the delay is justified, we give it little weight.

4. *June 2, 2004, to July 28, 2004: 56 days attributed to the State.*

¶12 During this time, the circuit court twice adjourned the date for a hearing on Villegas's motions, apparently to accommodate the circuit court's preferences and scheduling conflicts. The motions were ultimately scheduled for a hearing on July 28, 2004. Villegas did not request the delay. Accordingly, fifty-

six days of delay, caused by the circuit court, are assigned to the State. *See* ***Hadley***, 66 Wis. 2d at 362-63.

5. *July 28, 2004, to October 18, 2004: 82 days attributed to Villegas*.

¶13 On July 28, 2004, the circuit court denied the motion to dismiss that Villegas filed in March 2004. Defense counsel then advised the circuit court that the defense strategy likely gave rise to a conflict of interest between Villegas and any attorney from the state public defender's office. The matter was adjourned until October 18, 2004, to permit Villegas time to explore his need for successor counsel. Villegas's trial strategy necessitated this delay, and he concedes that he acquiesced to it. This period of delay is properly charged to him. *See* ***Urdahl***, 286 Wis. 2d 476, ¶26.

6. *October 18, 2004, to March 18, 2005: 151 days attributed to Villegas*.

¶14 At the October 18, 2004 status conference, Villegas appeared by successor counsel, Attorney Russell Bohach. Counsel requested time to complete and file a petition for a writ of *habeas corpus*. Thereafter, defense counsel twice sought extensions and eventually filed a motion on February 17, 2005, "to declare [WIS. STAT.] Chapter 980 unconstitutional." The circuit court set a March 18, 2005 hearing date. Villegas requested this period of delay, and he is responsible for it. *See* ***Urdahl***, 286 Wis. 2d 476, ¶26.

7. *March 18, 2005, to September 13, 2007: 909 days attributed to Villegas*.

¶15 On March 18, 2005, the circuit court rejected the challenges to the proceedings filed on Villegas's behalf in December 2003 and in February 2005. Following these decisions, Attorney Bohach moved the court to appoint

Dr. Michael Kotkin to serve at county expense as Villegas's psychological expert. The circuit court granted the motion and set a status date of June 24, 2005.[5]

¶16 In the 811-day period from June 24, 2005, to September 13, 2007, the circuit court set thirteen different deadlines for Dr. Kotkin to complete and file his report. On April 26, 2007, the State responded to Villegas's request for an eleventh adjournment to accommodate Dr. Kotkin by stressing the State's interest in "getting [Villegas] to trial as soon as possible." The circuit court, however, granted the adjournment and two more thereafter, finally establishing September 13, 2007, as the last of Dr. Kotkin's deadlines. By that time, the matter was set for trial in October 2007.

¶17 Villegas argues that the period of delay from June 24, 2005, to September 13, 2007, should be ascribed to the circuit court and counted against the State because the circuit court was too lenient in extending Dr. Kotkin's deadlines. Simply put, Villegas faults the circuit court for agreeing to delays that he requested. Under the doctrine of invited error, '"a defendant cannot create his own error by deliberate choice of strategy and then ask to receive benefit from that error on appeal.'" ***State v. Gary M.B.***, 2004 WI 33, ¶11, 270 Wis. 2d 62, 676 N.W.2d 475 (citation and one set of brackets omitted). We note that Villegas has not argued in any postdisposition proceeding that he received ineffective assistance from trial counsel, although the claim is available to a litigant contesting commitment as a sexually violent person. *See* ***State v. Lombard***, 2004

[5] The circuit court first appointed Dr. Michael Kotkin in February 2004 and established April 30, 2004, as the deadline for him to file a report. On that date, Villegas notified the circuit court that Dr. Kotkin required more time to complete his work, but no new deadline was chosen. The record reflects that, when the circuit court again appointed Dr. Kotkin in March 2005, he had not yet filed any report, nor had his first appointment terminated.

WI 95, ¶¶46-51, 273 Wis. 2d 538, 684 N.W.2d 103. Thus, Villegas implicitly acknowledges that his trial counsel proceeded reasonably in pursuing a defense strategy that included substantial efforts to secure a favorable report from a psychological expert. Accordingly, because Villegas's strategy caused the entirety of the delay from March 18, 2005, to September 13, 2007, we assign him the responsibility for it. *See* ***Urdahl***, 286 Wis. 2d 476, ¶26.

8. *September 13, 2007, to October 24, 2007: 41 days attributed to Villegas.*

¶18 On September 13, 2007, the circuit court heard Attorney Bohach's motion to withdraw. According to Attorney Bohach, he had a conflict of interest that arose "in the last three weeks" requiring both new defense counsel and a new psychological expert to replace Dr. Kotkin. Attorney Bohach assured the circuit court that he and Dr. Kotkin could "take care of" the potential for a reoccurring conflict by establishing "some parameters for new counsel so that these issues do not arise again." The nature of the conflict is not otherwise described in the record.

¶19 The State advised that it was ready to proceed to trial, but the circuit court granted defense counsel's motion to withdraw and vacated the October 2007 trial date. Villegas personally confirmed that he had no questions about the proceedings. Attorney Thomas Harris was appointed successor counsel for Villegas on October 24, 2007.

¶20 We conclude that this period of delay was necessitated by some unexplained peculiarity in Villegas's defense strategy that gave rise to a conflict of interest between Villegas and his defense team. Further, the defense team

apparently could control the conflict. We ascribe this period of delay to him. *See* ***id.***

9. *October 24, 2007, to January 17, 2008: 85 days discounted as reasonable time for defense counsel to review the file.*

¶21 On October 24, 2007, and twice thereafter, Attorney Harris requested time to familiarize himself with the case and to look for a new expert witness to assist Villegas. In December 2007, the circuit court set January 17, 2008, as the final status date for these purposes. The circuit court also tentatively scheduled a trial for June 23, 2008, with Attorney Harris's agreement. Although the State may not use defense counsel's reasonable need for time to prepare as a means to circumvent the defendant's right to a speedy trial, "neither may the delays resulting from the defense's requests be weighed against the State, especially in the absence of a speedy trial demand." ***Leighton***, 237 Wis. 2d 709, ¶19. Here, Attorney Harris did not couple his requests for time to review the file and to find an expert with a speedy trial demand. The delay requested by Attorney Harris to permit a preliminary review of the file and to find an expert is discounted.

10. *January 17, 2008, to November 24, 2008: 311 days attributed to Villegas; 1 day attributed to the State.*

¶22 On January 17, 2008, the circuit court granted Villegas's request to appoint Dr. Charles Lodl as the successor psychological expert for Villegas, and the circuit court scheduled a status conference for March 24, 2008. The status conference was twice adjourned at Villegas's request because Dr. Lodl required additional time to prepare a report. At the May 28, 2008 status conference, defense counsel moved to reschedule the trial because Dr. Lodl had not completed his work. Villegas personally objected to rescheduling the trial, and the circuit

court did not grant an adjournment. The circuit court scheduled another status conference for June 5, 2008, but the trial date remained June 23, 2008.

¶23 Villegas was not produced on June 5, 2008. Attorney Harris appeared and again advised the circuit court that Dr. Lodl could not be ready for trial on June 23, 2008. Attorney Harris further advised that Villegas withdrew his objection to postponing the trial. Although the State asserted that it was prepared to try the case, the circuit court found good cause to grant an adjournment. On June 23, 2008, with Villegas present, the circuit court set a November 17, 2008 trial date. Villegas personally confirmed his understanding of the need for delay.

¶24 One week before trial, on November 10, 2008, Attorney Harris filed a motion to withdraw. In support of the request, he cited a breakdown in his relationship with Villegas and a conflict of interest. The circuit court held a status conference the next day. Attorney Harris explained that he could no longer handle the case based on his deteriorating relationship with Villegas and based on an "ethical dilemma" that he was not free to describe. The State asserted that it was prepared for trial, but the circuit court ordered that the trial would not proceed on November 17, 2008. The circuit court continued the hearing on Attorney Harris's motion to that date and confirmed that Villegas should be produced for the hearing.

¶25 Villegas was not produced on November 17, 2008. The circuit court continued the hearing to the next day.

¶26 On November 18, 2008, the circuit court completed the hearing on Attorney Harris's motion to withdraw. Villegas joined the motion, explaining that he wanted a new attorney who would adopt his preferred strategy of challenging his criminal convictions in Illinois. He confirmed his understanding that his

request for new counsel would delay his trial.[6] The circuit court granted Attorney Harris's motion to withdraw and found good cause to adjourn the proceedings to November 24, 2008, for a status conference.

¶27 Villegas's requests for continuances and for new counsel caused the delay from January 17, 2008, to November 17, 2008, and from November 18, 2008, to November 24, 2008. These periods are therefore his responsibility. *See* ***Urdahl***, 286 Wis. 2d 476, ¶26. Although Villegas personally objected on May 28,

[6] At one point in his appellate brief, Villegas describes the record as ambiguous in regard to whether he objected to a delay of his trial during the November 18, 2008 hearing. At a later point in his brief, however, he states that he personally acquiesced to all of the delays necessitated by changes in counsel. We agree with his latter assessment. The circuit court conducted a colloquy on November 18, 2008, that included the following exchange:

> THE DEFENDANT: I expect that the following attorney would take those two cases to court because I've never committed those two other cases in Chicago and they're accusing me of being a rapist.
>
> THE COURT: Well, sir, the question right now is do you understand that if you get a different attorney it will take longer to get this case to trial. Do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And do you object to that additional time?
>
> THE DEFENDANT: Yes, of course. Of course. Because that has to be taken to court.
>
> THE COURT: Okay. So you understand that there's a need to put the trial off, correct?
>
> THE DEFENDANT: Yes.

We are satisfied that, in context, no ambiguity appears. *See* ***State v. Jankowski***, 173 Wis. 2d 522, 527, 496 N.W.2d 215 (Ct. App. 1992) ("whether ambiguity exists is a question of law"). The totality of Villegas's remarks plainly reflect his agreement to allow more time to prepare for trial because he believed that his lawyer should bring a circuit court challenge to his alleged Illinois convictions.

2008, to adjourning the June 23, 2008 trial date, his counsel withdrew the objection before the trial date arrived. The objection was thus nullified and provides no reason to ascribe any portion of delay to the State.

¶28 Villegas is not responsible, however, for the State's failure to produce him on November 17, 2008, or for the accompanying need to adjourn the hearing until the following day. Accordingly, during the period from January 17, 2008, to November 24, 2008, the State is responsible for one day of delay, and Villegas is responsible for the remainder. *See* ***id.***

11. *November 24, 2008, to January 20, 2009: 54 days attributed to Villegas; 3 days attributed to the State.*

¶29 Docket entries reflect that the circuit court held two status conferences to monitor appointment of new counsel for Villegas before the state public defender appointed Attorney Jeffrey W. Jensen on December 18, 2008. After a December 19, 2008 status conference was cancelled due to a "snow emergency," the parties appeared on December 22, 2008, and scheduled a status conference for January 20, 2009.

¶30 Villegas is not responsible for the three days of delay caused by inclement weather. Because the docket entries indicate that the circuit court was not available on the status conference date of December 19, 2008, we ascribe to the State the three-day delay in conducting that hearing. *See* ***Hadley***, 66 Wis. 2d at 362-63.

¶31 We ascribe the remainder of the delay to Villegas. Villegas acknowledged at the November 18, 2008 hearing that granting his request for a fifth appointed attorney would necessitate postponing his trial. He is responsible

for the unavoidable delay that followed discharging his fourth lawyer. *See* ***Urdahl***, 286 Wis. 2d 476, ¶26.

12. *January 20, 2009, to September 30, 2009: 253 days attributed to Villegas.*

¶32 On January 20, 2009, Attorney Jensen sought and received more time for Dr. Lodl to prepare his report.[7] At a status conference held off the record in March 2009, the circuit court scheduled a pretrial conference for September 18, 2009, and a trial for October 26, 2009.

¶33 At the September 18, 2009 pretrial conference, Attorney Jensen advised the circuit court that, after awaiting Dr. Lodl's report for some time, he learned in June 2009 or July 2009 that Dr. Lodl would not serve as a defense witness based on an ethical dilemma that is not otherwise described in the record. Attorney Jensen told the circuit court that he thereafter identified a third psychological expert for Villegas, and Attorney Jensen moved for the appointment of that expert at county expense. The circuit court conditionally denied the motion but offered to reconsider upon receipt of information explaining Dr. Lodl's inability to remain involved in the case. The circuit court scheduled a status conference for September 30, 2009.

[7] The proceedings of January 20, 2009, were conducted off the record. The docket entry of that date indicates that "the parties" requested additional time for Dr. Lodl to complete his report. The State points out in its respondent's brief that the reference in the docket to a request by "the parties" is likely the clerk's interpretation of a defense request, because only Villegas required his expert's report. Villegas did not file a reply brief and thus offered nothing to refute the State's contention. We take the State's contention as conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶34 We are satisfied that the period of delay from January 20, 2009, until September 30, 2009, stems from Villegas's efforts to secure evidence on his own behalf. We therefore attribute that period to him. *See* ***id.***

13. *September 30, 2009, to March 29, 2010: 180 days attributed to the State.*

¶35 On September 30, 2009, Attorney Jensen advised the circuit court that he had obtained funding from the state public defender's office to pay a successor psychological expert for Villegas. The parties agreed that the new expert was unlikely to be ready for trial by the scheduled date, and Attorney Jensen stated that he would prefer to reschedule the trial. The parties and the court agreed that March 2010 was the earliest mutually agreeable time for trial. Off the record, the parties selected a trial date of March 29, 2010. A court trial began that day.

¶36 In the State's view, the delay from September 30, 2009, to March 29, 2010, is the State's responsibility because the delay is attributable to scheduling problems occasioned by a congested court calendar. *See* ***Hadley***, 66 Wis. 2d at 363. We question the State's decision to accept responsibility for the entirety of this delay. Attorney Jensen, not the prosecutor, expressed a preference for a new trial date in lieu of the previously scheduled date of October 26, 2009. Given the State's concession, however, we will attribute this period of delay to the State, keeping in mind that delay arising from overcrowded courts "should be weighted less heavily" than deliberate attempts to hamper the defense. *See* ***Barker***, 407 U.S at 531.

14. *Summary of delay*.

¶37 The delay totaled 2344 days. We discount eighty-five of those days because they stem from a request by Villegas's fourth lawyer for preparation time upon appointment. The State is responsible to some degree for 312 days of delay. We assign little weight, however, to the nine days of that delay resulting from the prosecutor's illness, to the 180 days of delay caused by an overcrowded court docket, and to the three days caused by a snow emergency. Thus, 120 days of delay weigh significantly against the State. The balance of 1947 days is Villegas's responsibility.

C. Speedy Trial Demand.

¶38 We next consider whether Villegas asserted the right to a speedy trial. *See* ***id.*** at 530. He did not.

¶39 '"[A] defendant has no duty to bring himself to trial.'" ***Leighton***, 237 Wis. 2d 709, ¶20 (citations omitted). Therefore, a defendant who fails to demand a speedy trial does not necessarily waive the right. *See* ***Barker***, 407 U.S. at 528. Nonetheless, the "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." ***Id.*** at 532.

¶40 Defense counsel never made a speedy trial demand. Villegas asserts, however, that his *pro se* motions constitute a request for a speedy trial. These were: (1) a motion to dismiss, filed on October 25, 2005, claiming that

crimes in Illinois attributed to him were committed by another Juan Villegas;[8] (2) a motion to dismiss, filed on April 11, 2008, again claiming that crimes in Illinois attributed to him were committed by another Juan Villegas; (3) a motion for an evidentiary hearing, filed on November 10, 2008, to address the validity of the Illinois convictions attributed to him; (4) a motion to dismiss, filed on January 21, 2009, asserting that his psychiatric diagnosis is unreliable; (5) a motion to dismiss, filed on April 1, 2009, based on modifications to the instruments used in sex offender risk assessment; (6) a motion for a "re-probable cause hearing," filed on April 1, 2009; and (7) a motion for an evidentiary hearing, filed on March 18, 2010, to challenge his alleged convictions in Illinois.[9]

¶41 Although Villegas asserts on appeal that his "*pro se* motions in and of themselves reflect his growing frustration with the process," he is unable to identify any motion that stated a desire, let alone a demand, for a speedy trial on the merits. His motions sought to advance theories that might lead to dismissal, not to trial.

¶42 Marginally more helpful to Villegas is his personal objection on the record when defense counsel requested an adjournment of the trial on May 28, 2008, to accommodate Dr. Lodl. On June 5, 2008, however, defense counsel explained to the circuit court that Villegas withdrew his objection. Villegas does

[8] Villegas's first motion to dismiss included a request for an interpreter, and a later motion included a request for a Spanish-speaking attorney. We note that, from May 2008 forward, Villegas appeared in circuit court with a Spanish-language interpreter and that his appeal includes no claim of inability to communicate with trial counsel.

[9] Villegas does not suggest that the circuit court erred by failing to address each of his *pro se* motions. We note that, normally, a litigant must choose whether to proceed *pro se* or with counsel. *See* WIS. CONST. art. I, § 21(2).

not suggest on appeal that his counsel was unauthorized to make this representation to the circuit court or that the representation was false. Therefore, Villegas cannot rely on his May 28, 2008 objection to an adjournment. *Cf.* ***State v. English-Lancaster***, 2002 WI App 74, ¶19, 252 Wis. 2d 388, 642 N.W.2d 627 (doctrine of judicial estoppel precludes party from successfully pressing one position in the circuit court and then arguing on appeal that the position was erroneous).

¶43 In sum, Villegas did not demand a speedy trial. We conclude that his *pro se* efforts are entitled to no weight when balancing the relevant ***Barker*** factors.

D. Prejudice to Villegas.

¶44 The fourth consideration is prejudice to Villegas. *See* ***Barker***, 407 U.S. at 530. We must assess this consideration in light of three specific interests protected by the right to a speedy trial. *See* ***Leighton***, 237 Wis. 2d 709, ¶22. These interests are: "'(1) preventing oppressive pretrial incarceration; (2) minimizing the accused's anxiety and concern; and (3) limiting the possibility that the defense will be impaired.'" ***Id***. (citation omitted).

¶45 Villegas addresses only the first two of these factors. As to the third factor, he admits that he cannot "articulate prejudice in his ability to try this case." Limiting impairment to the defense case, however, is "the 'most serious'" of the three interests protected by the right to a speedy trial. *See* ***id.***, ¶23 (citation omitted). Thus, any weight afforded to the consideration of prejudice here is diminished because it is the product of lesser considerations.

¶46 Villegas asserts that he suffered oppressive pretrial incarceration. He contends that the delay "put [him] in an untenable position with regard to sexual offender treatment programs" because he could not participate in such programs and maintain his defense, and because his treatment records might be used against him at trial.

¶47 Villegas does not demonstrate that he was eager for sex offender treatment or that limited access to such treatment oppressed him. The trial testimony revealed that, while imprisoned for sexual assault, he "participated in a Deniers Sexual Offender Treatment Program. It was not a successful completion. And that was the extent of his sex offender treatment while in prison."

¶48 Additionally, the fact of his detention is entitled to only limited weight under the circumstances here. While the petition in this case was pending, he was neither jailed nor imprisoned but rather held in Wisconsin's secure mental health facilities. Indeed, at the close of the trial, after the circuit court set a date for a decision, trial counsel requested that Villegas be returned to the Wisconsin Resource Center forthwith, explaining that he is "a patient not a prisoner" and that "at the Resource Center [the patients] have a lot more freedom than they have there in the jail."

¶49 Last, Villegas contends in a single paragraph that the delay in this case "did the opposite of minimizing [his] anxiety and concern." He asserts that his life was "disrupted upon learning that, after serving a five-year sentence, he would not be released when expected." Although Villegas undoubtedly was disappointed when he was not released into the community at the end of his prison sentence, he identifies no disruption that was not first caused by his conviction and imprisonment for sexual assault.

¶50 Moreover, in assessing prejudice, we cannot ignore the outcome of the trial. The circuit court found that Villegas is a sexually violent person, a finding that Villegas does not dispute on appeal. Nothing in the record or in Villegas's submission suggests that a speedier resolution would have altered the fact finder's conclusion. Our supreme court has observed on several occasions: '"[r]elease of a ch. 980 patient whose dangerousness or mental disorder has not abated serves neither to protect the public nor provide care and treatment for the patient.'" ***State v. Schulpius***, 2006 WI 1, ¶39, 287 Wis. 2d 44, 707 N.W.2d 495 (citation omitted). Therefore, in considering prejudice here, we give weight to the circuit court's findings at trial. *Cf.* ***Beyer***, 287 Wis. 2d 1, ¶82 (Roggensack, J., concurring) (person committed under WIS. STAT. ch. 980 not prejudiced by delay in conducting a probable cause hearing to determine eligibility for release when all experts opined that the person remained sexually violent).

CONCLUSION

¶51 Upon our review of the ***Barker*** factors, we cannot conclude that Villegas suffered a violation of the right to a speedy trial. The length of the delay was extraordinary. Nonetheless, it earns him no relief. He did not demand a speedy trial. He shows no significant prejudice from the delay. Most critically, the State bears very little responsibility for the delay in this case. Most of the adjournments stemmed from Villegas's success in persuading the circuit court to give him every opportunity to present a defense. To be sure, he wanted the proceedings dismissed. The record reflects, however, that he resisted putting the substantive allegations against him before a fact-finder while he lacked the shield of a psychological expert to assist him and while the State alleged that he had a criminal history of sexual violence in Illinois. "[B]arring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied

th[e] constitutional right [to a speedy trial] on a record that strongly indicates, as does this one, that the defendant did not want a speedy trial." ***Barker***, 407 U.S. at 536. We affirm.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).