

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 18, 2012

Diane M. Fremgen
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. 2012AP534-CR

Cir. Ct. No. 2009CM1250

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD P. FLEHMER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County:
VINCENT K. HOWARD, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ Richard Flehmer appeals a judgment of conviction for operating with a prohibited alcohol concentration, second offense. He argues his right to a speedy trial was violated and, as a result, the circuit court erred by

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

failing to dismiss the charges against him. We conclude Flehmer's speedy trial right was not violated and affirm.

BACKGROUND

¶2 On June 23, 2009, the State charged Flehmer with operating while intoxicated, second offense. It later amended the complaint, adding the charge of operating with a prohibited alcohol concentration, second offense. Flehmer made his initial appearance on July 1 and was released on a signature bond. Trial was scheduled for October 26.

¶3 At a pretrial conference, Flehmer advised the court that he would be filing a suppression motion. Trial was postponed, and a motion hearing was scheduled for February 16, 2010. The court denied Flehmer's suppression motion at the February hearing and scheduled trial for May 6, 2010. However, Flehmer's trial did not occur on May 6, and it did not occur on the rescheduled trial dates of February 15, 2011 or August 23, 2011. Flehmer's trial was delayed because other cases on the court's calendar had superiority due to pending speedy trial demands or age of the case.

¶4 Flehmer's trial was rescheduled for December 5, 2011. On November 17, 2011, Flehmer moved to dismiss the charges based on a violation of his right to a speedy trial. The court acknowledged the motion but reasoned it would not consider the merits until after the December 5 jury trial. The jury found Flehmer guilty of operating with a prohibited alcohol concentration.² On January 23, 2012, the court orally denied Flehmer's motion to dismiss and

² He was acquitted of operating while intoxicated.

sentenced him for operating with a prohibited alcohol concentration. The court subsequently issued a written decision denying Flehmer's motion to dismiss.

DISCUSSION

¶5 On appeal, Flehmer argues the State violated his right to a speedy trial. “Both the Sixth Amendment to the United States Constitution and article I, section 7 of the Wisconsin Constitution guarantee an accused the right to a speedy trial.” *State v. Urdahl*, 2005 WI App 191, ¶11, 286 Wis. 2d 476, 704 N.W.2d 324. “Whether a defendant has been denied the right to a speedy trial is a constitutional question that this court reviews de novo.” *State v. Leighton*, 2000 WI App 156, ¶5, 237 Wis. 2d 709, 616 N.W.2d 126. However, we accept any factual findings made by the circuit court unless they are clearly erroneous. *Id.*

¶6 To determine whether a defendant's right to a speedy trial has been violated, we consider: “(1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant.” *Urdahl*, 286 Wis. 2d 476, ¶11 (citation omitted). The right to a speedy trial must be considered based on the totality of the circumstances. *Id.* “Essentially, the test weighs the conduct of the prosecution and the defense and balances the right to bring the defendant to justice against the defendant's right to have that done speedily.” *Id.* If a speedy trial violation has occurred, the charges against the defendant must be dismissed. *Id.*

Length of the delay

¶7 The length-of-the-delay factor functions first as a triggering mechanism. *Id.*, ¶12. Courts are not required to inquire into the other speedy trial factors unless the length of the delay is considered presumptively prejudicial.

State v. Borhegyi, 222 Wis. 2d 506, 510, 588 N.W.2d 89 (Ct. App. 1998). A delay that approaches twelve months is considered presumptively prejudicial. *Id.*

¶8 The State concedes that the length of the delay is presumptively prejudicial because the time between the complaint's filing date and Flehmer's trial was approximately twenty-nine months. We agree this delay is presumptively prejudicial. We therefore analyze the remaining three factors and then balance all four factors to determine whether Flehmer's right to a speedy trial was violated. *See Urdahl*, 286 Wis. 2d 476, ¶25.

Reason for the delay

¶9 When determining whether the reason for the delay amounts to a constitutional violation of a defendant's speedy trial right, "different weights should be assigned to different reasons." *Barker v. Wingo*, 407 U.S. 514, 531 (1972). A deliberate attempt by the State to delay trial to hinder the defense is weighed heavily against the State. *Id.* Delays caused by the State's negligence or overcrowded courts are still counted against the State; however, they are weighed less heavily. *Id.* If the delay is caused by the defendant, it is not counted. *Urdahl*, 286 Wis. 2d 476, ¶26.

¶10 Flehmer concedes seven months of the delay is attributable to his suppression motion and therefore not counted. He argues the remaining delays were caused by court congestion and are weighed against the State. We agree and conclude the remaining delays are counted against the State but are not weighed heavily because they were caused by the court's calendar. *See Barker*, 407 U.S. at 531.

Assertion of the right to a speedy trial

¶11 The third factor considers whether the defendant asserted his or her right to a speedy trial. *Urdahl*, 286 Wis. 2d 476, ¶11. Although a defendant is not required to assert the right to a speedy trial, his or her assertion of that right is entitled to strong evidentiary weight in determining whether the defendant’s right was violated. *Barker*, 407 U.S. at 532. Moreover, “failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.” *Id.* “[T]he purpose of requiring some showing of assertion of right [is] necessary to distinguish cases where there [is] evidence that the defendant did not want to be brought to trial.” *Hadley v. State*, 66 Wis. 2d 350, 361, 225 N.W.2d 461 (1975).

¶12 Here, Flehmer concedes he did not demand a speedy trial. Although he correctly points out he was not required to assert this right, the circuit court observed in its written decision that, “While not determinative, ... Flehmer [had] a strong motivation to delay the trial date” because he was required to have a commercial driver’s license for his job, and, if convicted, he would have lost that license and presumably his job. The court also found that the timing of Flehmer’s pretrial motions—the suppression motion was filed eleven days before the October 24, 2009 trial and the motion to dismiss was filed fifteen days before the December 5, 2011 trial—was consistent with its observation that Flehmer was motivated to delay trial.

Prejudice

¶13 Prejudice is considered with reference to the three interests that the right to a speedy trial protects: prevention of oppressive pretrial incarceration, prevention of anxiety and concern by the accused, and prevention of impairment

of the defense. *Leighton*, 237 Wis. 2d 709, ¶22. Flehmer concedes the first and third interests are not implicated—he was released on bond during the proceedings and his defense was not impaired because of the delay. He argues he was prejudiced because the delay caused him anxiety.

¶14 Prejudice as a result of anxiety exists in every criminal case. *Urdahl*, 286 Wis. 2d 476, ¶35. “Without more than the bare fact of unresolved charges ... we view the prejudice ... as minimal.” *Id.* Flehmer argues the unresolved charges created more anxiety for him because they affected his ability to work. However, as discussed above, the circuit court observed that Flehmer had a motivation to delay trial so that he could keep his commercial driver’s license and employment. We conclude Flehmer has only shown minimal prejudice.

Balancing the factors

¶15 Balancing all four factors, we conclude Flehmer’s right to a speedy trial was not violated. Although the twenty-two month delay attributable to the State is a long period of time, no part of that delay is weighed heavily against the State because the delay was caused by the court’s congested calendar. Moreover, the State points out the delay in *Barker* was even longer than in this case and, in *Barker*, the Court did not find a speedy trial violation. *See Barker*, 407 U.S. at 534 (no speedy trial violation even with five-year delay). Flehmer failed to file a reply brief and therefore has not refuted this argument. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed conceded).

¶16 Further, balanced against the length of time is Flehmer’s failure to assert his right to a speedy trial, which makes it difficult to determine whether he

wanted a speedy trial. *See Barker*, 407 U.S. at 532. Additionally, the circuit court noted that it appeared Flehmer wanted the trial delayed in order to keep his commercial driver's license and job, and his motion practice was consistent with the court's observation. Finally, Flehmer has only shown minimal prejudice. Based on the totality of the circumstances, we conclude the circuit court correctly denied his motion to dismiss the charges.

By the Court.—Judgment affirmed.

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

