COURT OF APPEALS
DECISION
DATED AND RELEASED

December 13, 1995

No. 94-3021-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES M. SMITH,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Kenosha County: MARY KAY WAGNER-MALLOY, Judge. *Affirmed*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

PER CURIAM. James M. Smith appeals from a judgment convicting him as a repeat offender of attempted burglary, possession of burglary tools and criminal damage to property. He also appeals from an order denying his motion for postconviction relief. He contends that his constitutional guarantee to a speedy trial was violated and that trial counsel was ineffective for not making a proper demand for disposition under the Interstate Agreement on Detainers, § 976.05, STATS. We reject both claims and affirm the judgment and the order.

Smith was charged on February 3, 1992. He entered a not guilty plea. He was released from custody on bail prior to April 3, 1992. Smith failed to appear at an April 13, 1992, pretrial conference. By a letter dated April 17, 1992, Smith informed the court that he had been unable to appear because of his detention in jail in Cook County, Illinois.

By a letter of May 3, 1992, Smith requested the trial court to appoint counsel and expressed a desire to dispose of the case. Smith wrote the trial court again on October 2, 1992, "seeking whatever remedy available at this time to resolve [his legal] problem." On October 9, 1992, Smith filed a pro se petition for a writ of habeas corpus to bring his case before the court. Smith's trial counsel filed a demand for speedy trial on October 29, 1992.

By a letter dated November 5, 1992, to the warden of the Shawnee Correctional Center in Illinois, where Smith was incarcerated, Smith gave notice that he sought final disposition of the Wisconsin charges under the Interstate Agreement on Detainers (IAD). A demand for final disposition accompanied that letter.

On May 13, 1993, trial counsel filed a motion to dismiss the charges upon the failure to provide Smith with a speedy trial. The motion was denied. A trial to the court was held on October 27, 1993.

Smith contends that under the IAD, § 976.05, STATS., he should have been brought to trial within 180 days of his early November 1992 demand for final disposition. However, he concedes that there is no evidence that the documents necessary to invoke the IAD reached the trial court. *See* ***Fex v. Michigan***, 507 U.S. 43, ___, 113 S. Ct. 1085, 1091 (1993) (notice must actually be received by the prosecuting office in order for the time limits of the IAD to apply). He claims that trial counsel was ineffective for failing to "live up to his responsibility to insure that the details of the statute were complied with." But for an additional sentence at the conclusion of his brief that trial counsel failed to include a demand for trial under the IAD in the demand for a speedy trial, this is the entirety of Smith's ineffective assistance of counsel claim.

We will not address an argument inadequately briefed and which lacks citation to proper legal authority. ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992). Even applying the well-known tests of ineffective assistance of counsel of deficient performance and prejudice, we conclude that Smith's claim lacks merit. Counsel acknowledged at the ***Machner***[1] hearing that Smith wrote a letter asking counsel to file a motion for a speedy trial under the IAD. Counsel explained that he believed that the demand he made for a speedy trial under the federal and state constitutions and § 971.10, STATS., covered all the bases. Further, counsel was aware that Smith himself was pursuing a request for final disposition under the IAD. In the motion to dismiss the prosecution, counsel argued that the IAD had been invoked and not complied with. Although counsel's representation may not have been ideal, we conclude, as did the trial court, that counsel's conduct was reasonably effective representation. *See* ***State v. McMahon***, 186 Wis.2d 68, 80, 519 N.W.2d 621, 626 (Ct. App. 1994).

Smith argues that his right to a speedy trial under the Sixth Amendment to the United States Constitution and under Article I, sec. 7 of the Wisconsin Constitution was violated. Four factors are used to determine whether a defendant has been denied his right to a speedy trial: (1) the length of the delay; (2) the cause of the delay; (3) the defendant's assertion of the right to a speedy trial; and (4) the prejudice, if any, resulting from the delay. ***Barker v. Wingo***, 407 U.S. 514, 530 (1972); ***Day v. State***, 61 Wis.2d 236, 244, 212 N.W.2d 489, 493 (1973), *cert. denied*, 417 U.S. 914 (1974).

The threshold question is whether the length of delay is presumptively prejudicial. That question must be answered in the affirmative before inquiry can be made into the remaining three factors. ***Hatcher v. State***, 83 Wis.2d 559, 566-67, 266 N.W.2d 320, 324 (1978). The State concedes here that the nearly twenty months between charging Smith and his trial triggers inquiry under the remaining three ***Barker*** factors.

Turning to the reason for the delay, we first note that there is no hint of improper motive for delay. As the State points out, Smith's case was

[1] A ***Machner*** hearing addresses a defendant's ineffective assistance of counsel claim. *See* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

timely pursued until Smith failed to appear and again after Smith was returned to Wisconsin.

Smith focuses on the period of delay between April 1992 and June 1993. It appears that delay in returning Smith to Wisconsin for the purpose of disposing of the charges was attributable to all parties. Smith caused himself to become incarcerated in Illinois by his own criminal activity. His failure to appear at the final pretrial conference on April 13, 1992, caused the adjournment of the trial set for later that month.

Smith argues that the prosecutor did not do all that was possible to return Smith to Wisconsin for trial. However, Smith concedes that the Illinois correctional officials were somewhat remiss in acting on his demand for disposition under the IAD. We will not charge the prosecutor with the conduct of the Illinois officials.

It is true that the prosecutor received a May 14, 1992, memo from the trial court asking for confirmation that Smith was in custody in Illinois and to "arrange for this case to continue to progress."[2] The memo did not impose sole responsibility on the prosecutor to have the matter set for trial.[3] The same is true with respect to Smith's pro se petition for a writ of habeas corpus which the prosecutor received a copy of in mid-October 1992. That document expressed Smith's desire to negotiate a plea in order to resolve his legal problems in Wisconsin. The prosecutor was never presented with an equivocal demand for return to Wisconsin. The prosecutor acted under the IAD when the papers from the Illinois correctional officials were received in March 1993. The entire delay cannot be charged to the prosecution.

The third factor is Smith's assertion of his right to a speedy trial. Smith relies on the letters he wrote to the court and his pro se petition for a writ of habeas corpus as evidence of his early and continual assertion of his right to a

[2] The trial court's May 14, 1992, memo was sent to the public defender's and the district attorney's offices. It was in response to Smith's May 3, 1992, letter to the trial court seeking the appointment of counsel and expressing concern over disposing of the charges.

[3] Indeed, new trial counsel was appointed for Smith on June 5, 1992.

speedy trial. However, the letters to the trial court in April and May of 1992 did not mention a desire for a speedy trial. Even Smith's October 2, 1992, letter which had the subject notation, "THE RIGHT TO A FAST AND SPEEDY TRIAL," did not make a clear demand for trial in the body of the letter. As already mentioned, the petition for a writ of habeas corpus only sought to bring the case on for plea negotiations. Smith did not unequivocally assert his federal and state constitutional rights to a speedy trial until the formal demand was filed on October 29, 1992, almost six months after his failure to appear at the final pretrial hearing.

Finally, we conclude that the delay did not prejudice Smith. The amount of delay was not so great so as to alone create prejudice. *Cf.* ***Doggett v. United States***, 505 U.S. 647, 655-56 (1992) ("excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify. While such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other Barker criteria, it is part of the mix of relevant facts, and its importance increases with the length of delay."). The right to a speedy trial seeks: "'(i) to prevent oppressive pretrial incarceration; (ii) to minimize the anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.'" ***Hatcher***, 83 Wis.2d at 569, 266 N.W.2d at 325 (quoting ***Barker***, 407 U.S. at 532). Smith does not suggest that any of those interests were impaired by the delay.

Smith does not contend that his incarceration during the delay was oppressive. Indeed, it was the result of his own criminal activity. Smith made bond when he was returned to Wisconsin after being paroled by Illinois corrections. He has not demonstrated any serious degree of anxiety or concern over the delay in disposing of the pending charges. *See* ***United States v. Tucker***, 8 F.3d 673, 676 (9th Cir. 1993) (defendant can only establish prejudice if he or she reasonably experiences anxiety and concern to such a degree that it distinguishes his or her case from that of any other litigant), *cert. denied*, 114 S. Ct. 1230 (1994). There is no suggestion that the delay impaired Smith's ability to present a defense. Smith presented no witnesses at trial and did not cross-examine the State's witnesses. Smith was convicted upon the testimony of a witness to Smith's attempted entry to a locked merchandise trailer who identified Smith ten to fifteen minutes after reporting the incident. There is no possibility that the defense was delayed by the loss of witnesses or the destruction of exculpatory evidence.

In conclusion, our balancing of the factors does not require a determination that Smith's right to a speedy trial was violated. There was a long delay but it resulted from neutral causes attributable to all parties to the action. *See* ***Hatcher***, 83 Wis.2d at 570, 266 N.W.2d at 326. Although Smith demanded a speedy trial, he did not do so until six months had passed from his original failure to appear and many oblique references to wanting to dispose of the charges. There was no prejudice to Smith.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.