

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JANUARY 23, 1996

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

NOTICE

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**Nos. 95-2115-CR-NM
95-2116-CR-NM**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARVIN D. DOYLE,

Defendant-Appellant.

APPEAL from judgments of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Counsel for Marvin D. Doyle has filed a no merit report pursuant to RULE 809.32, STATS. Doyle filed a response challenging his counsel's analysis of the issues and raising additional issues. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude that there is no arguable merit to any issue that could be raised on appeal.

A jury convicted Doyle of second-degree reckless endangerment while armed and retail theft, while acquitting him of retail theft while armed. The State presented evidence that Doyle and another man were observed hiding nonprescription drugs in their clothing in a drug store. The store manager and an employee confronted the two men who initially agreed to accompany them to a back room to wait for the police. A struggle broke out on the way to the back room and Doyle's companion successfully fled the premises after striking the employee in the face. While he was struggling with Doyle, the manager observed Doyle's right arm swing up in an arc. He then felt a sharp jab to his neck. The manager grabbed Doyle's wrist and saw that he was holding a knife. The manager was eventually aided by his employee in detaining Doyle until the police arrived.

The no merit report addresses whether the verdicts were inconsistent, whether Doyle's speedy trial rights were violated and whether the delay in bringing the theft while armed charge resulted in a violation of due process. Our independent review of the record confirms counsel's analysis of these issues.

The jury's verdict was consistent with the testimony adduced at trial and the jury instructions given. The court instructed the jury that in order to convict on the charge of retail theft while armed, it had to find that Doyle committed retail theft "while using a dangerous weapon." The finding that Doyle did not use the weapon while committing the retail theft is not inconsistent with the finding that he used the weapon to endanger the store manager's safety during the struggle. The verdict is consistent with the theory that Doyle "possessed" the knife while committing retail theft and "used" the knife while committing reckless endangerment.

Doyle was initially charged in April 1993 with armed robbery and second-degree reckless endangerment while armed. In August 1993, the court dismissed the armed robbery charge for lack of probable cause. After considering whether to appeal the dismissal, the State filed a new complaint in March 1994 alleging retail theft while armed. Trial on both the reckless endangerment and theft while armed charges began in September 1994.

The delay in charging Doyle with retail theft while armed did not result in a due process violation. For such a delay to constitute a violation of due process, the delay must be an intentional device by the State to gain tactical advantage over the accused or to harass him or must have resulted in actual prejudice to the defendant. See *State v. Strassburg*, 120 Wis.2d 30, 36, 352 N.W.2d 215, 218 (Ct. App. 1984). The record contains no evidence of actual prejudice or intentional delay to harass or gain tactical advantage. No witness's memory was impaired, evidence was not lost and Doyle was not hindered in his ability to defend himself.

Doyle's constitutional and statutory speedy trial rights were not violated. Whether the accused has been deprived of his constitutional right to a speedy trial is an *ad hoc* determination to be made upon consideration of relevant factors including the length of the delay, the reason for the delay, the defendant's assertion of his right and prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). The sixteen month delay in bringing Doyle to trial resulted in no prejudice to the defense. Doyle stipulated to adjournment for part of this time and created some of the delay himself by filing motions to dismiss his counsel. We perceive no violation of Doyle's constitutional speedy trial right.

Any argument relating to Doyle's statutory speedy trial right fails for two reasons. First, the clerk's docket entries support the trial court's finding that Doyle's counsel stipulated to the only delay that arguably implicates Doyle's statutory speedy trial rights. Second, dismissal of the charges is not a remedy for violation of statutory speedy trial rights. See *Rabe v. Ferris*, 97 Wis.2d 63, 67, 293 N.W.2d 151, 153 (1980). The remedy for a violation of the statutory speedy trial right, release of the defendant pending trial, see § 971.10(4), STATS., is now moot. This remedy was not available to Doyle before trial because he was simultaneously held on a probation revocation in another county. We conclude that there is no arguable merit to Doyle's arguments regarding statutory or constitutional speedy trial rights.

In his response Doyle contends that, after the armed robbery charge was dismissed following the preliminary hearing, the State should not have been allowed to charge retail theft while armed. See *State v. Williams*, 190 Wis.2d 1, 9, 527 N.W.2d 338, 340 (Ct. App. 1994); *State v. Williams*, 186 Wis.2d

506, 509-12, 520 N.W.2d 920, 922-23 (Ct. App. 1994). The *Williams* cases hold that when a charge is dismissed from a multiple count complaint at a preliminary hearing, the prosecution may not rely on facts presented at the preliminary hearing with regard to the dismissed charge to form the basis of a new charge in an information. When a charge is dismissed, the prosecution must file a new complaint and begin the process anew. *Id.* Here, the prosecution did exactly that. Doyle was not entitled to a new preliminary hearing because the new complaint charged only a misdemeanor offense. Penalty enhancers that subject a defendant to additional years of incarceration do not convert a misdemeanor into a felony. See *State v. Denter*, 121 Wis.2d 118, 123, 357 N.W.2d 555, 557-58 (1984). The record establishes no defect in the manner in which Doyle was charged.

Doyle also argues that his trial counsel was ineffective for failing to investigate whether the victim received serious injury or underwent hospital treatment. Second-degree reckless endangerment requires only that the defendant endangered the safety of another human being by reckless conduct. See WIS J I—CRIMINAL 1347 (1993). Criminally reckless conduct only requires that the defendant's conduct created an unreasonable and substantial "risk" of death or great bodily harm. Actual bodily harm is not required for proof of this charge. The risk of death or great bodily harm that arises from being stabbed in the neck exists regardless of whether the store manager actually suffered serious injury. Therefore, Doyle has not established ineffective assistance of his trial counsel because he has not established any prejudice from his attorney's failure to investigate the seriousness of the victim's wounds. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Doyle's response also argues *res judicata*, double jeopardy and due process violations in terms that present no cognizable issue. We conclude that there is no arguable merit to any issue raised in the no merit report or the response. Our independent review of the record discloses no other potential issues for appeal. We therefore affirm the judgments of conviction and relieve Attorney Sara Van Winkle of further representing Doyle in this matter.

By the Court.—Judgments affirmed.