COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3693-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROGER P. BARBER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: MARIANNE E. BECKER, Judge. *Affirmed.*

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

SNYDER, P.J. Roger P. Barber appeals from a judgment of conviction for two counts of burglary in violation of § 943.10(1)(a), STATS. He contends that the nineteen-month delay in bringing the case to trial violated his constitutional right to a speedy trial and asks that the charges be dismissed because he was prejudiced by the delay. Although Barber is correct that the proper relief for a violation of his constitutional right to a speedy trial is dismissal, we conclude

that he has failed to show that he was prejudiced by the delay and affirm the judgment of conviction. We begin with a brief overview of the procedural history of the case.

PROCEDURAL HISTORY

A criminal complaint and warrant were filed on September 14, 1994, charging Barber with two counts of burglary. At the time the complaint was filed in Waukesha County, Barber, who was on parole, was in jail in another county on an unrelated charge. Barber's parole was subsequently revoked and he was returned to prison where he remained throughout all of the proceedings pertinent to this appeal.

On September 20, 1995, more than a year after the complaint was filed, the State filed an order to produce Barber to have him appear on the pending charges in Waukesha County. On October 4, 1995, he made his initial appearance. On October 23, 1995, the State received Barber's request for prompt disposition. A preliminary hearing and arraignment were held on October 26, 1995, and Barber was bound over for trial.

On February 19, 1996, Barber waived his right to prompt disposition,[1] *see* § 971.11(2), STATS., in order to give his counsel additional time to prepare for trial. Barber's jury trial ultimately began on April 9, 1996, and after the two-day trial he was found guilty of two counts of burglary.[2] Following his

[1] Although Barber waived his right to prompt disposition under § 971.11(2), STATS., he expressly retained his right to appeal his constitutional right to a speedy trial guaranteed by the Sixth Amendment of the United States Constitution.

[2] Testimony presented at trial, as well as the arguments of counsel, will be provided as applicable to the relevant issues on appeal.

conviction, the trial court denied Barber's motion to dismiss, which was based on a violation of the constitutional guarantee of a speedy trial.[3] Barber now appeals.

Although we are bound to sustain a trial court's factual findings unless clearly erroneous, we independently review the trial court's application of constitutional principles to the facts of a case. *See* ***State v. Trammel,*** 141 Wis.2d 74, 77, 413 N.W.2d 657, 658-59 (Ct. App. 1987). The issue of whether a defendant is prejudiced by a delay in getting to trial is a question of law which we review de novo under the admitted state of the facts. *See* ***State v. Ziegenhagen,*** 73 Wis.2d 656, 664, 245 N.W.2d 656, 660 (1976).

The right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and imposed on the states through the Fourteenth Amendment. *See* ***Barker v. Wingo,*** 407 U.S. 514 (1972). ***Barker*** sets forth the analysis which is used to determine whether an accused's right to a speedy trial has been violated. *See* ***id.*** at 530. Following the Supreme Court's decision, the Wisconsin Supreme Court stated that although criteria it had previously applied in this area generally remained valid, these criteria would now be redefined pursuant to the ***Barker*** decision. *See* ***Day v. State,*** 61 Wis.2d 236, 244, 212 N.W.2d 489, 493 (1973). When a defendant challenges this right, the court employs a balancing test in which the conduct of both the prosecution and the defendant are weighed. *See* ***Barker,*** 407 U.S. at 530. The following four factors are considered: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his or her right, and (4) prejudice to the defendant. *See* ***id.*** We will discuss each in turn.

[3] Barber had earlier filed a motion to dismiss claiming this constitutional violation; however, the trial court reserved ruling on the motion until the completion of the trial.

LENGTH OF DELAY

The first factor, the length of the delay, is a triggering mechanism. *See* ***id.*** Until there is some delay which is presumptively prejudicial, it is unnecessary to inquire into the other factors of the test. *See* ***id.*** When the interval between accusation and trial has crossed the threshold dividing ordinary from "'presumptively prejudicial'" delay, the need for judicial examination of the remaining factors is necessary. *See* ***Doggett v. United States,*** 505 U.S. 647, 651-52 (1992) (quoting ***Barker v. Wingo,*** 407 U.S. 514 (1972)).

Speedy trial concerns attach at the time the defendant becomes the accused, which is when the complaint and warrant are issued. *See* ***State v. Lemay,*** 155 Wis.2d 202, 210, 455 N.W.2d 233, 236 (1990). In ***Hadley v. State,*** 66 Wis.2d 350, 363, 225 N.W.2d 461, 467 (1975), a delay of almost eighteen months between charging and trial "was so excessive that it leads prima facie to the inquiry of whether there was a denial of speedy trial."

In the instant case, a complaint and warrant naming Barber were issued on September 14, 1994. This is the point at which speedy trial concerns attach. *See* ***Lemay,*** 155 Wis.2d at 210, 455 N.W.2d at 236. Barber's initial appearance was almost thirteen months later and the trial commenced nearly nineteen months later. The State concedes that the length of delay in this case is presumptively prejudicial and is sufficient to trigger inquiry into the remaining factors of ***Barker***. We accept the State's concession and proceed with our inquiry.

REASON FOR THE DELAY

The next factor we consider is the reason for the delay. This inquiry is underpinned by our recognition that the State has a duty to a defendant and to society to bring an accused to a speedy trial. *See* ***Green v. State,*** 75 Wis.2d 631, 636, 250 N.W.2d 305, 307 (1977). Furthermore, it is the State's responsibility to produce in a timely fashion any accused who is held in State custody. *See* ***id.*** However, when a defendant brings a claim that the State has been derelict in this duty, the ***Barker*** Court clarified that differing weights are assigned to various reasons that may be given to explain 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 weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.

Barker, 407 U.S. at 531.

The State offers "an overcrowded criminal justice system" as the reason for the delay. We are not persuaded. The record shows that the delay was due to the negligence of the prosecutor. The assistant district attorney who filed the original complaint stated to the court at a motion hearing on this issue that he "operated under the understanding that when a person was transferred or sent to an institution that the registrar would be a person who would do checks on any outstanding warrants …." Because of this belief, the assistant district attorney made no attempt to locate Barber subsequent to filing the warrant with the Wisconsin Crime Information Bureau. When Barber was returned to prison, no warrant check was performed. Furthermore, the record evidence in this case also shows that Barber's parole agent spoke to the assistant district attorney about

Barber and the forthcoming charges while he was in jail prior to his parole revocation.[4] It was the State's responsibility to find Barber; we visit the failure to do so in a timely manner on the State.

Nonetheless, there is nothing in the record to suggest that the delay of thirteen months between the filing of the complaint and Barber's initial appearance was intentional, or that it was motivated by a desire to disadvantage Barber in the preparation of his defense. The delay was clearly due to negligence on the part of the assistant district attorney, and as such weighs less heavily than if the facts showed it to be intentional.[5]

DEFENDANT'S ASSERTION OF HIS RIGHT

The third factor we must consider is whether Barber asserted his right to a speedy trial. While a defendant's failure to demand a speedy trial does not constitute waiver of this right, a complete failure or delay in demanding a speedy trial will be weighed against him or her. *See* ***Hatcher v. State,*** 83 Wis.2d 559, 568, 266 N.W.2d 320, 325 (1978). A defendant cannot consciously avoid the "day of reckoning" by not coming forward. *See* ***Hadley,*** 66 Wis.2d at 361, 225 N.W.2d at 465-66. However, a defendant has no duty to bring himself or herself to trial; rather, that duty rests upon the state. *See* ***Barker,*** 407 U.S. at 527.

[4] According to the record, Barber was in the Milwaukee County Jail until December 14, 1994, at which time he was transferred to Dodge Correctional Institution. He remained at Dodge for two weeks until his final transfer to Waupun Correctional Institution.

[5] The remaining six months' delay between the filing of the complaint and the warrant and Barber's trial does not factor into the speedy trial analysis. Defense counsel requested a two-month adjournment in order to prepare for trial; the remaining time was due to scheduling within the court system. However, neither of these factors excuses the State's responsibility for the initial thirteen-month delay.

The State contends that Barber delayed in asserting his right to a speedy trial because he did not make a demand until October 4, 1995, thirteen months after the State issued the complaint and warrant. The State also points to Barber's parole hearing in April 1995, and further argues that because the parole commissioner noted the possibility that Waukesha County might be issuing charges that Barber knew of the pending charges.

We reject this argument. The application of this reasoning would require Barber's demand for a speedy trial to be entered as soon as he had knowledge that there was a possibility that charges might be filed against him. It is the State's duty to bring a defendant to trial and to insure that the resulting trial comports with due process. *See* ***Barker,*** 407 U.S. at 527. As soon as Barber was brought before the court for his initial appearance, he asserted his demand for a speedy trial.[6] He consistently repeated this demand at subsequent points in the proceedings. We conclude that at numerous appropriate points Barber asserted his right to a speedy trial.

PREJUDICE TO THE DEFENDANT

The fourth factor which must be examined is whether the delay has resulted in prejudice to the defendant. This prejudice should be assessed in light of the interests that the speedy trial right is designed to protect. *See* ***Barker,*** 407 U.S. at 532. The ***Barker*** Court denominated the following interests for consideration: (1) to prevent oppressive pretrial incarceration, (2) to minimize anxiety and concern of the accused, and (3) to limit the possibility that the defense

[6] The record also shows that on October 19, 1995, Barber signed a "Detainer Acknowledgement" and requested prison officials to send the prosecutor a copy of his request for prompt disposition of the case.

will be impaired. *See* ***id.*** We will consider these factors in turn as each pertains to the facts of this case.

Pretrial Incarceration

Barber argues that in spite of the fact that he was in prison on another conviction during the thirteen-month delay between the filing of the complaint and warrant and his initial appearance, we must recognize that "[i]ncarceration for other reasons, no matter how legitimate they may be, is simply dead-time in terms of awaiting a trial upon a criminal charge which is delayed." ***Hadley,*** 66 Wis.2d at 365, 225 N.W.2d at 467. However, ***Watson v. State,*** 64 Wis.2d 264, 271, 219 N.W.2d 398, 402 (1974), conversely suggests that when a defendant is already incarcerated as a result of an unrelated conviction, this fact alone militates against a determination that the delay produced "oppressive pretrial incarceration." Barber argues that the threat of charges, during the thirteen months, was a factor in his original parole revocation and in the denial of parole and "may have been" the reason he was incarcerated at a maximum security prison.

Even if the reasoning of ***Hadley*** is applied, we conclude that the weight of this argument is slight. Barber's parole was revoked because of his admitted drug use, his failure to report, and *two pending burglary charges and a theft charge*. The report from his prison parole hearing cited that Barber had failed to pursue drug treatment programming and, more importantly, noted that "[t]he risk of [Barber's] release is unreasonable." Barber's third argument, that the threat of charges hampered his movement through the prison system, is based on mere speculation. We conclude that Barber has not made a compelling

argument that his interest in avoiding oppressive pretrial incarceration was prejudiced in any significant way by the delay.[7]

Anxiety about Pending Charges

The next interest we consider is whether Barber was subjected to unnecessary anxiety due to the delay in bringing the charges. The trial court found that any anxiety suffered by Barber was minimal. Barber argues that while he did not know the precise nature of the charges until he was brought in for his initial appearance, he did know that such charges were "threatened." He ascribes anxiety to this threat. We are unpersuaded. A defendant cannot be said to have anxiety about pending charges until he or she becomes aware of them. *See* ***Hipp v. State,*** 75 Wis.2d 621, 629, 250 N.W.2d 299, 304 (1977). The record reflects that Barber was aware of three *other* pending charges in another county during the thirteen months that he was incarcerated.[8] As stated by defense counsel, "Mr. Barber first learned that charges were pending when he was brought to court for the initial appearance." We conclude that Barber was not subjected to undue anxiety during the delay by the mere specter of further charges.

Impairment of a Defense

The final interest that the right to a speedy trial is designed to protect is to limit the possibility that the defense will be impaired. The inability of a defendant to adequately prepare a case skews the fairness of the entire system and, as such, is the most serious of the three interests. *See* ***Barker,*** 407 U.S. at 532. A

[7] Barber argued to the trial court that the delay "hampered his prospects for a concurrent sentence." However, he fails to develop this argument on appeal and it will not be addressed. *See* ***State v. Pettit***, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992).

[8] The three pending charges were a Class A misdemeanor, and Class B and C felonies.

defense may be impaired when: (1) witnesses die or disappear during the delay, (2) witnesses are unable to accurately recall facts because of the passage of time, and (3) a defendant is otherwise hindered in his or her ability to gather evidence, contact witnesses or otherwise prepare a defense. *See* ***id.***

Barber argues that he was prejudiced by the inability of certain witnesses to accurately recall particular facts. He first argues that three witnesses gave conflicting testimony about whether the police dusted for fingerprints at the residence of one of the burglaries.[9] Our review of the trial transcript reveals that the inconsistent testimony was all related to the issue of whether the residence was "sprayed" or "dusted" for fingerprints. One officer who had been at the scene, but was not assigned to the gathering of evidence, testified on cross-examination that the residence was "sprayed" for fingerprints. Another officer, who had actively gathered evidence at the scene, testified that he "dusted" for fingerprints. The adult daughter of the homeowners, who had discovered the burglary when she entered the home to check on the residence while her parents were on vacation, stated that she observed the detective "dusting" objects for fingerprints.

The defense also points to conflicting testimony as to which officers were on the scene and how long each stayed at the residence. A careful review of the record reveals that the claimed inconsistency related to the order in which two investigating officers left the residence and the vehicles that they left in.

Barber's third claim is that "[t]wo witnesses expressly blamed their inability to recall certain facts on the two-year lapse between the offenses and

[9] Barber does not argue that there were any memory lapses or inconsistencies with regard to witnesses' testimony relating to the other charged burglary.

trial." The record reveals the specifics of this claim: the victims' daughter was unable to accurately recall how many small cardboard boxes were lying on the floor of her parents' ransacked home, and a detective who gathered evidence at the scene could not specify whether a particular jewelry box came from the master bedroom or another bedroom of the residence.

All of the above witnesses appeared for the State. All of these "inconsistencies" in testimony were heard by the jury. The defense extensively cross-examined these witnesses, emphasizing the conflicting points of testimony. Many of the details the daughter was unable to remember cannot even be ascribed to the passage of time. For a civilian untrained in police investigative techniques, memory of the specifics of a police investigation, i.e., the identities and duties of specific officers at the scene, the order in which the officers departed and the number of cardboard boxes lying on the floor, would likely be unclear even in the immediate aftermath of an investigation.

Furthermore, the inconsistent facts that Barber directs us to likely did not significantly affect the outcome of the trial. The credibility of witnesses lies within the province of the jury. *See* ***Thompson v. Village of Hales Corners,*** 115 Wis.2d 289, 318, 340 N.W.2d 704, 718 (1983). The defense utilized its opportunity to cross-examine and expose the inconsistencies of the State's witnesses. Any inconsistencies in testimony are to be reconciled and resolved by a jury. *See* ***Wirsing v. Krzeminski,*** 61 Wis.2d 513, 525, 213 N.W.2d 37, 43 (1973).

Barber also argues that his defense was hampered because if not for the delay, he could have better accounted for his whereabouts at the pertinent times and possibly presented an alibi defense. Based on our review of the record, this argument is little more than speculation and, as such, can be given only slight

weight. *See* ***Hatcher,*** 83 Wis.2d at 570, 266 N.W.2d at 326. Apart from the cross-examination conducted by defense counsel, Barber did not attempt to present any sort of defense to either crime. Barber did not call any witnesses, nor has he claimed that a particular witness could have been called had it not been for the delay. Because Barber's argument lacks any specific assertions of how his defense was prejudiced, we give only slight weight to his claim that absent the delay he might have presented a very different defense.

Barber also argues that he was prejudiced by the delay in that he was hampered in his ability to effectively challenge the chain of custody of the evidence. However, he does not point us to any portion of the testimony where he claims that there were memory lapses with regard to the chain of custody. The record also reveals extensive cross-examination of the officers as to the handling of the physical evidence. As stated above, the jury is the final arbiter of credibility, *see* ***Thompson,*** 115 Wis.2d at 318, 340 N.W.2d at 718, and we conclude that Barber has failed to establish any prejudice relating to the impairment of a defense.

As a final point, Barber does not argue that any potential witnesses died or disappeared during the delay, nor does he suggest that his ability to gather evidence or contact witnesses was hindered in any concrete way. Mere speculation relating to these factors is entitled to only slight weight. *See* ***Hatcher,*** 83 Wis.2d at 570, 266 N.W.2d at 326.

BALANCING OF THE FACTORS

None of the four factors outlined by the ***Barker*** Court are either necessary or sufficient to support a finding that a defendant was deprived of the right to a speedy trial. *See* ***Barker,*** 407 U.S. at 533. Instead, they are all related

factors and must be considered together along with other relevant circumstances. *See* ***id.*** The factors do not have talismanic properties and a reviewing court must engage in a difficult and sensitive balancing process. *See* ***id.***

In this case, a balancing of the factors does not convince us that Barber was prejudiced by the delay in bringing him to trial. While the thirteen-month delay between the filing of the complaint and warrant and charging is presumptively prejudicial, our examination of the other factors that are to be included in the balance fails to reveal any compelling prejudice. The delay was not due to any antagonism on the part of the State; rather, it was the result of negligence. This factor weighs less heavily than it would if it had been shown to be intentional. Barber's claim that he was prejudiced by his pretrial incarceration is not borne out by the facts; he was incarcerated on another conviction and the revocation and denial of parole were clearly ascribed to other factors. His claim of anxiety falters, as he had other pending charges during the delay and he cannot claim ongoing anxiety about charges that he knows nothing about.

Finally, he has failed to show that his ability to present a defense was impaired in any substantial way. The inconsistencies in the witnesses' testimony were all pointed out to the jury through extensive cross-examination by defense counsel. Furthermore, because the inconsistent witnesses were all witnesses for the State, any inconsistencies should have helped Barber's case, not impaired it. Barber's entire defense consisted of cross-examination of the State's witnesses, and he has failed to provide this court with any concrete way in which his defense was hampered. Mere speculation that a case might have been tried differently cannot be transformed into actual prejudice.

In balancing the factors outlined in ***Barker,*** we are not convinced that Barber has shown any significant prejudice. The remedy of reversal is proper only when the delay has prejudiced a defendant.[10] *See* ***Watson,*** 64 Wis.2d at 271, 219 N.W.2d at 402. We conclude that Barber has failed to show actual prejudice; therefore, the judgment is affirmed.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[10] We note that at sentencing the trial court appeared to imply that Barber's sentence was slightly reduced in order to remedy any injustice that occurred as a result of the delay. However, in the next sentence the trial court states, "I don't believe [the delay in bringing Barber to trial] is causal." As we noted above, had Barber been prejudiced by the delay, the remedy for such delay is dismissal. *See* ***Watson v. State,*** 64 Wis.2d 264, 271, 219 N.W.2d 398, 402 (1974).