COURT OF APPEALS
DECISION
DATED AND FILED

June 29, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 98-0685-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROY J. JONES,
A/K/A JAMES JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

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

PER CURIAM. Roy Jones appeals from a judgment of conviction and from an order denying his motion for postconviction relief. Jones was found guilty of one count of first-degree sexual assault of a child, contrary to § 948.02(1), STATS.; two counts of first-degree sexual assault of a child while

armed, contrary to §§ 948.02(1) and 939.63, STATS.; two counts of kidnapping while armed, contrary to §§ 940.31(1)(b) and 939.63, STATS.; one count of sexual assault, contrary to § 940.225(1)(b), STATS.; and one count of attempted sexual assault, contrary to §§ 940.225(1)(b) and 939.32, STATS. All counts were subject to the habitual criminality enhancer pursuant to § 939.62, STATS. Jones claims: (1) he was denied his constitutional right to a speedy trial; (2) the evidence at trial was insufficient to sustain the guilty verdicts; and (3) his sentence of one-hundred forty-three years was excessive and unduly harsh.[1]

I. BACKGROUND.

Jones was charged with crimes resulting from two separate incidents. As to the first, the record shows that at midnight on May 3, 1994,[2] Aleisha H. was waiting for a bus when a man, later identified as Jones, approached her and asked her to help him fix his car. Aleisha accompanied Jones to his car, where he told her to get in and that he would take her home. Instead, Jones drove to a field where he stopped the car, pulled out a knife, ordered her not to say anything, touched her breasts and forced her to kiss him. He then drove away from the field to a garage where he first tinkered with his car and then ordered Aleisha to get into the back seat. He then demanded that she take off her clothes. Aleisha complied and Jones took off his pants. According to Aleisha's testimony, he then "tried to have sex with me," making penis-to-vagina contact. After Aleisha told him to stop several times, Jones told her to shut up and called her a

[1] Apparently, Jones argues his sentence was excessive with respect to all counts involving both victims, but he argues that the evidence was insufficient only with respect to the charges involving Aleisha.

[2] The crime began on May 2, 1994 near midnight and continued on to May 3, 1994.

"bitch." Jones then forced his penis into Aleisha's anus while hitting her in the face. After they were both dressed and in the front seat of the car, Jones held Aleisha's head down and drove her to the group home where she was living at the time. Once there, he allowed her to leave. Aleisha reported the incident to a staff member at the group home.

Aleisha spoke with the police that same morning and described her attacker as a tall, dark-skinned, black male, 30 to 40 years of age, who was bald and had a goatee. Aleisha also described the car that Jones drove that night as a four-door green or gray vehicle with a crack in the windshield. Jones was arrested on December 9, 1995. In December 1995, a year-and-one-half after the assault, Aleisha identified Jones as her attacker in a police lineup.

Jones was also charged with an assault on Easter B. Easter related that on August 23, 1995, Jones forced the then sixteen-year-old Easter into his car with the use of a handgun and threatened to kill her. He touched her breasts and kissed her, hitting her when she resisted. He forced her to have penis-to-vagina intercourse and pushed her head down towards his exposed penis. When Easter resisted, he told her to get out of the car and threatened to "blow [her] fucking head off" if she looked back. Easter was able to escape and reported the incident to the police.

On December 19, 1995, a trial date was set for February 26, 1996, for the consolidated charges involving both Aleisha and Easter. On February 12, 1996, the State requested an adjournment to conduct DNA testing. When the defense did not object, the trial court granted the request. A new trial date was set for April 29, 1996. On March 19, 1996, Jones entered a speedy trial demand. On April 19, 1996, the State requested an adjournment because of a delay in obtaining

the DNA test results. Jones moved to dismiss. The trial court granted the State's request and decided it would use the April 29, 1996 date as a pretrial date to ascertain the reason for the delay in the DNA testing. The trial court declined to dismiss the charges. The April 29 pretrial date was rescheduled, due to court calendar conflict, to May 9, 1996. On May 9, 1996, the court rescheduled the trial to June 17, 1996 because of further delays in the DNA testing being conducted by the State. On June 10, 1996, the court granted another request by the State for an adjournment based upon the failure of the experts to complete the DNA testing. Jones agreed to this adjournment. Trial was then set for August 26, 1996. On August 8, 1996, Jones requested an adjournment, which the trial court did not initially grant, but apparently reconsidered and granted at a later date. This resulted in the rescheduling of the trial to November 18, 1996. On October 16, 1996, Jones requested and obtained another adjournment, and a trial date of January 21, 1997 was set. On January 21, 1997, the State requested and received an adjournment, to which Jones did not object. The jury trial finally commenced on April 7, 1997.

At trial, Jones presented an alibi defense for the crimes involving Aleisha. In support of his alibi, his girlfriend of ten years testified that Jones was home the entire day and evening of May 2, 1994. She testified that she recalled that date because Jones was recuperating from injuries he received in an accident. She described his physical appearance on that date as being different than the description Aleisha gave to the police, and she also described the car he had at that time as being somewhat unlike the car Aleisha described.

The jury convicted Jones. He was sentenced to one hundred and forty-three years in prison. Jones sought postconviction relief, which the trial court denied. He now appeals.

II. DISCUSSION.

Speedy Trial Demand

Jones claims his speedy trial demand was not met and he was unreasonably detained for sixteen months between the time of his arrest and the time of trial. He argues that, as a result, the charges against him should be dismissed. We conclude that Jones was not denied his constitutional right to a speedy trial.

The constitutional right to a speedy trial is found in the Sixth Amendment to the United States Constitution and Article 1, § 7 of the Wisconsin Constitution.[3] Whether a defendant has been denied his or her speedy trial right is a constitutional question, which this court reviews *de novo*. *See* ***State v. Ziegenhagen***, 73 Wis.2d 656, 664, 245 N.W.2d 656, 660 (1976). Under the United States and Wisconsin Constitutions, to determine whether a defendant has

[3] The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence [sic].

Article 1, § 7 of the Wisconsin Constitution provides:

> **Rights of accused.** SECTION 7. In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf; and in prosecutions by indictment, or information, to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law.

been denied the right to a speedy trial, a court must consider: (1) the length of the delay; (2) the reason for the delay, i.e., whether the government or the defendant is more to blame for the delay; (3) whether the defendant asserted the right to a speedy trial; and (4) whether the delay resulted in any prejudice to the defendant. *See* ***Doggett v. United States***, 505 U.S. 647, 651 (1992); ***Barker v. Wingo***, 407 U.S. 514, 530 (1972); ***Day v. State***, 61 Wis.2d 236, 244, 212 N.W.2d 489, 493 (1973).

The first factor, the length of the delay, is a threshold consideration, and the court must determine whether the length of delay is presumptively prejudicial before an inquiry can be made into the remaining factors. *See* ***Doggett***, 505 U.S. at 651-52 ("Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay"); ***Hatcher v. State***, 83 Wis.2d 559, 566-67, 266 N.W.2d 320, 324 (1978); *see also* ***Doggett***, 505 U.S. at 652 n.1 ("Depending on the nature of the charges, the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year.") If the length of delay is presumptively prejudicial and the court determines that, under the totality of the circumstances, the defendant has been denied the right to a speedy trial, the court must dismiss the charges. *See* ***Barker***, 407 U.S. at 522, 533. The length of the delay is measured beginning at the time of an arrest, indictment or other official accusation. *See* ***Doggett***, 505 U.S. at 655.

In this case, the delay from the time of arrest, December 9, 1995, to the time of trial, April 7, 1997, was sixteen months. This amount of time is presumptively prejudicial. *See* ***Doggett***, 505 U.S. at 652 n.1. Having determined that the delay is presumptively prejudicial, the analysis continues.

The second factor to be considered is the reason advanced for 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 weighted less heavily …." ***Barker***, 407 U.S. at 531.

An examination of the requests for adjournments in the case reveals that Jones's requests for adjournments delayed the case a total of five months. The State's requests for an adjournment delayed the case ten months, however, eight of these months are for adjournments to which Jones agreed. Thus, there was a two-month delay to which Jones objected. The reason given by the State for this delay was the failure of the laboratory to complete the DNA testing. We conclude that this delay caused by the State and objected to by Jones was minimal, compared to the months caused by the delays attributable to Jones and the non-objected to delays of the State. We further conclude that this factor weighs neither in favor of Jones nor the State, as the majority of the delays were agreed to by both parties.

The next factor in the analysis is whether the defendant asserted his or her right to a speedy trial. This factor is pivotal to the analysis, *see* ***Barker***, 407 U.S. at 531-32, and weighs strongly in our conclusion that Jones was not denied the right to a speedy trial. Jones first asserted his speedy trial right about three months after his arrest. He reminded the court of his demand only once during a court proceeding early in the case after the State requested an adjournment. Although it is significant that Jones asserted his speedy trial right early in the proceedings, he nevertheless failed to complain when delays continued and, in fact, he agreed to many of the delays which were requested after his speedy trial demand was made. Thus, we conclude that this factor does not weigh in Jones's

favor. *See* ***Barker*** 407 U.S. at 531 ("The more serious the deprivation [of the speedy trial right], the more likely the defendant is to complain.").

The fourth factor in the analysis is whether the delay has caused the defendant prejudice. It is to be assessed in light of the defendant's interests that the speedy trial right was designed to protect. ***Id.*** at 532. These interests include: (1) preventing oppressive pretrial incarceration; (2) minimizing anxiety and concern of the accused; and (3) guarding against the possibility that the defense will be impaired. *See* ***id.***

Jones first argues that he was prejudiced because he was incarcerated for sixteen months while awaiting his trial. As the State points out, Jones ignores the fact that he would have remained incarcerated during the pretrial period whether or not there had been a delay in his trial because his parole had been revoked. Thus, this argument fails.

Jones next argues that the anxiety he suffered by the delay "should be self-evident" because he was facing nearly three hundred years in prison on these charges. No doubt this fact caused some anxiety, but the anxiety caused by the delay is not self-evident just because Jones says it is. He offers no support for this assertion and points to nothing to show such anxiety. Further, the fact that he may have experienced anxiety may have been more due to the fact that he was facing three hundred years in prison rather than anxiety caused by the passage of time. Thus, we determine that this argument, too, fails.

Finally, Jones argues that he was prejudiced because "the memory of his alibi witness as well as his own memory[,] was surely impaired" by the delay. Jones provides nothing to illustrate this assertion and we find nothing in the record to suggest that his witness's memories were impaired. In fact, as the State points

out, Jones's alibi witness's recall of the events was so good that she testified to what she ate for breakfast and lunch on May 2, 1994. Despite Jones's assertion that her memory was impaired, the witness's testimony indicates a remarkable ability to recall the events of a day which occurred three years earlier. Thus, this factor is given no weight since Jones has nothing to support it and we conclude the opposite to be true.

Although the sixteen-month delay is presumptively prejudicial, none of the other factors weigh in Jones's favor. We thus conclude Jones was not denied his constitutional right to a speedy trial.

Sufficiency of the Evidence

Next, Jones challenges his convictions stemming from the charges brought against him involving Aleisha. He argues that there was insufficient evidence to convict him. When reviewing the sufficiency of the evidence, we may only reverse if "the evidence viewed most favorably to the state and the conviction is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *See* ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). This is not the case here.

Jones claims that the inconsistencies in Aleisha's testimony were so significant that there was no credible evidence to convict him. He claims that Aleisha "made numerous grave errors in her description of Roy Jones and his car—not the least of which is the great disparity in his described and actual height and weight." Aleisha described her attacker to one police officer as a black male who had a dark complexion with a medium build, five feet eight inches tall, with a mustache and a goatee and weighing one hundred and eighty pounds. She

described him again to a different police officer as a black male, chubby, balding with a goatee who was thirty to forty years old. After Jones was arrested, Aleisha identified Jones from a police lineup. He was thirty-two years old. Aleisha also identified Jones at trial as her attacker. Jones claims to be six-feet-two inches tall and weighed 235 pounds at the time of the incident concerning Aleisha. Given the disparity, he argues that Aleisha's description of him is insufficient to convict him. Jones also claims that Aleisha's description of his car was also incorrect because his actual car on May 2, 1994 was a two-tone green, two-door vehicle with no crack in the windshield. He asserts that this, along with other inconsistencies, demonstrates that there was insufficient evidence to convict him.

We reject Jones's contentions. Jones claims that these alleged inconsistencies so eroded the testimony of Aleisha as to render her testimony unbelievable. However, "the function of weighing the credibility of witnesses is exclusively in the jury's province …." ***State v. Allbaugh***, 148 Wis.2d 807, 809, 436 N.W.2d 898, 899 (1989) (quoted citation omitted).

Based on the testimony of police officers and the descriptions given by Aleisha, along with her identification of Jones in a police lineup, as well as her in-court identification, the jury could have reasonably found beyond a reasonable doubt that Jones was the assailant. "The test is not whether this court … [is] convinced [of the defendant's guilt] beyond a reasonable doubt, but whether this court can conclude [that] the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true …." ***Poellinger***, 153 Wis.2d at 503-04, 451 N.W.2d at 756 (citation omitted). We, therefore, reject Jones's contention.

Excessive and Unduly Harsh Sentence

Jones argues that the sentence he received, one-hundred forty-three years, is disproportionate to the seriousness of the crimes involving Aleisha and Easter. We disagree.

"Sentencing is left to the discretion of the trial court, and appellate review is limited to determining whether there was an [erroneous exercise] of discretion." ***State v. Harris***, 119 Wis.2d 612, 622, 350 N.W.2d 633, 638 (1984). A strong policy exists against interfering with the trial court's discretion in determining sentences. ***State v. Sarabia***, 118 Wis.2d 655, 673, 348 N.W.2d 527, 537 (1984). Our review is limited to determining whether the trial court erroneously exercised its discretion. *See* ***State v. Borrell***, 167 Wis.2d 749, 781, 482 N.W.2d 883, 895 (1992). To obtain relief on appeal, the defendant "must show some unreasonable or unjustified basis in the record for the sentence imposed." ***Id.*** at 782, 482 N.W.2d at 895. The primary factors a court should consider when sentencing a defendant are the gravity of the offense, the character of the offender, and the need for the protection of the public. *See* ***Sarabia***, 118 Wis.2d at 673, 348 N.W.2d at 537.

Additionally, a sentence constitutes cruel and unusual punishment only if it is "so excessive and unusual, and so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Steeno v. State***, 85 Wis.2d 663, 669, 271 N.W.2d 396, 399 (1978) (citation omitted).

Jones asserts, without further elaboration, "the sentence of 143 years in prison is effectively a life sentence. Even considering the nature of the offenses, a life sentence is disproportionate enough to the crimes to shock the

public sentiment." The record shows that the trial court considered the proper factors in sentencing. With regard to the issue of the gravity of the offenses, the trial court stated, "It just doesn't get much more serious than this short of homicide cases." It also considered the character of the defendant in stating, "I think you are in a very dangerous place in your life right now, Mr. Jones.… It was clearly a very angry assault in my view, indicating some deep-seated anger at women or people around you." Finally, the trial court commented on the need to protect the public when it remarked that "clearly these are the kinds of assaults that scare everybody in the community."

Jones has failed to show that his sentence was excessively harsh. He had a sordid history of previously sexually assaulting young girls. These new offenses involved unknown young girls who he lured to his car and then proceeded to drive to various locations where he sexually and physically assaulted them numerous times. Jones was facing a maximum exposure of two-hundred and forty-five years in prison and received only one-hundred and forty-three. Given the aggravating circumstances of the assaults, Jones's sentence was not so excessive and harsh as to constitute cruel and unusual punishment as Jones claims. We conclude that, under the circumstances present here, the trial court did not erroneously exercise its discretion in its sentencing determination.

For the aforementioned reasons, we affirm.

By the Court.—Judgment and order affirmed.

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