COURT OF APPEALS
DECISION
DATED AND FILED

August 23, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0733-CR
01-0734-CR
STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS H. HIGHMAN,

DEFENDANT-APPELLANT.

APPEALS from judgments and orders of the circuit court for Dodge County: JOHN R. STORCK, Judge. *Affirmed.*

¶1 VERGERONT, P.J.[1] Thomas Highman appeals two judgments of conviction, one for operating a motor vehicle after revocation, fifth offense, and one for operating a motor vehicle while intoxicated, sixth offense, and the orders

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

denying his motions for postconviction relief.[2] He contends that his right to a speedy trial was violated, and he therefore is entitled to a reversal of the judgments of conviction and dismissal of the charges. We conclude the trial court correctly decided his right to a speedy trial was not violated, and we therefore affirm.

BACKGROUND

¶2 The criminal complaints were filed on August 28, 1997, charging Highman with operating a motor vehicle after revocation in violation of WIS. STAT. § 343.44(1), and operating a motor vehicle while intoxicated (OWI) and with a prohibited alcohol concentration (PAC) in violation of WIS. STAT. § 346.63(1)(a) and (b). The initial appearance was scheduled for September 8, 1997. On August 26, 1997, Highman wrote a letter to the court asking it to enter not guilty pleas. Highman did not appear on September 8. At the rescheduled initial appearance on September 15, 1997, Highman appeared without counsel and asked for an opportunity to obtain counsel. The court ordered a $1,000 personal appearance bond on each count as a condition of bail. The initial appearance took place on September 22, 1997, at which time Highman appeared with counsel. He stood mute to the charges and the court entered pleas of not guilty and scheduled a pretrial conference for October 9, 1997.

¶3 In early October 1997, Highman filed a motion for a twelve-person jury trial, a number of discovery motions, a motion to suppress, and a motion to dismiss the complaint. At the pretrial conference on October 9, 1997, a motion hearing was scheduled for February 17, 1998. At that hearing the court heard

[2] There were two cases with separate case numbers and records in the trial court, but the cases were handled together. This court granted Highman's motion to consolidate the appeals.

evidence on the motion to suppress and denied that motion, and denied the motion to dismiss the complaint. With respect to the motion for a twelve-person jury, the prosecutor asked the court to consider waiting to rule on that issue until the Wisconsin Supreme Court decided the issue in a case then pending before that court. The trial court asked Highman's counsel if he was aware of the timetable in the supreme court. Highman's counsel answered that briefing had been closed for a couple of weeks at least, if not over a month, and, although no one knew when the decision would be released, typically one can assume a decision within a couple of months after the close of briefing. After conferring with the clerk, the court stated that a trial in the case would likely be scheduled in May. The court decided to take the motion under advisement, attempt to find out the supreme court's timetable for releasing a decision, and then either schedule a trial after the decision was available, or if that was going to take too long, decide the motion without waiting for the supreme court's decision.

¶4 On June 19, 1998, the supreme court released ***State v. Hansford***, 219 Wis. 2d 226, 580 N.W.2d 171 (1998), in which it held that a person charged with a misdemeanor is entitled to a twelve-person jury under the Wisconsin Constitution. However, Highman's case "fell through the cracks" and the court did not realize it had a decision pending until someone from the office of Highman's counsel called the trial court's clerk in February 1999. The case was then scheduled for a status conference on February 25, 1999, and at the conference the court set a trial date of March 25, 1999. The prosecutor moved for a continuance of that trial date on the ground that a necessary witness from the Wisconsin State Laboratory of Hygiene was on vacation out of state from March 22, 1999 through March 26, 1999. Highman stated that he did not object to a continuance, and the court granted the motion. By notice dated April 9, 1999, the court set the trial for July 1, 1999.

¶5 On April 14, 1999, the prosecutor wrote Highman's counsel requesting a continuance of the July 1 trial date because the same witness was going to be on vacation from June 28, 1999 through July 2, 1999. Highman then moved for a dismissal of the charges on the ground that the delay in bringing Highman to trial was due to the State's failure to notify the court after the ***Hansford*** decision and the State's inability to produce its own witness, which violated Highman's right to a speedy trial.

¶6 At a hearing on June 22, 1999, the court heard Highman's motion to dismiss and the State's motion for a continuance of the July 1 trial. The court denied the motion to dismiss. The court considered: the length of delay, the principal reason for the delay—waiting for the ***Hansford*** decision and the case then "falling through the cracks" until Highman's counsel's office contacted the clerk's office, the fact that Highman did not assert the right to a speedy trial until this motion, and prejudice to Highman. The court acknowledged there was some emotional uncertainty for Highman due to the delay. However, it stated that whether Highman would be prejudiced by the inability of witnesses to recall events could not be determined before the trial. Considering these factors, the court decided it was not appropriate to dismiss the case at that time. The court denied the motion, stating that Highman could renew the motion after trial if the trial showed he was prejudiced by the delay.

¶7 The trial took place on August 26, 1999, and the jury returned guilty verdicts on all counts. The court sentenced Highman to twelve months in jail with

Huber privileges on each count, concurrent to one another.[3] Highman filed a postconviction motion again requesting dismissal of the charges on the ground of delay. In addition to the arguments he made earlier, Highman contended that the delay affected his defense at trial because the memories of the arresting officer and the medical technician who drew his blood had faded.

¶8 After a hearing the court denied the motion. As with the pretrial motion, the court recounted the reasons that a trial had not taken place until August 1999. The court described the delay from February 1998 until June 1998—waiting for the decision in ***Hansford***—as one agreed to by both parties and by the court. It described the delay from one month after that decision[4] until February 1999 as "not excusable" and due to the court's failure to issue a timely decision on the jury issue. However, the court recognized that, regardless of the reason for the delay, the two years from the complaint to the trial did raise a presumption of the violation of the right to a speedy trial and did require the court to analyze the relevant factors to determine if the delay justified a dismissal of the charges.

¶9 The court found the delay was not the result of an attempt to hamper the defense. The court also found that Highman did not assert his right to a speedy trial until he filed the motion in May 1999, and this weighed against dismissal. However, the court stated, the principal reason it was not appropriate to dismiss

[3] Although Highman was found guilty of both WIS. STAT. § 346.63(1)(a) and (1)(b), only one conviction may result for purposes of sentencing and counting convictions for certain statutes. Section 346.63(1)(c).

[4] The court reasoned that ordinarily one might not know of a supreme court decision until a month or so after its release.

the case was the lack of prejudice to Highman. The court found that the case was relatively simple, the evidence at trial was overwhelming, the blood test was a .21, the officer had an extensive report, there were no key failures of the officer to recall, there were no key witnesses who had died or could not recall key facts, and the inability of the hospital technician to recall drawing the blood was not a critical factor in determining Highman's guilt or innocence. The court referred to the fact that Highman was not incarcerated while waiting for trial; it stated that Highman had some anxiety but it was not substantial. In summary, the court found that only six months or so of the two-year delay was inexcusable and there was no actual prejudice to the defendant by that delay.

DISCUSSION

¶10 Whether a pretrial delay violates a defendant's right to a speedy trial under the state and federal constitutions[5] is a question of law, which we review de novo, although we uphold the trial court's findings of fact unless they are clearly erroneous. ***State v. Leighton***, 2000 WI App 156, ¶5, 237 Wis. 2d 709, 616 N.W.2d 126. In deciding this question, the court is to apply a four-part balancing test that considers: (1) the length of delay, (2) the reason for delay, (3) whether the defendant asserted the right to a speedy trial, and (4) whether the delay resulted in any prejudice to the defendant. ***Id.*** at ¶6.

¶11 The length of delay is the first factor we are to consider because only if the delay is presumptively prejudicial does the court consider the other three factors. ***Id.*** at ¶7. The State agrees with Highman and the trial court that the two-

[5] U.S. CONST. amend. VI; WIS. CONST. art. I, § 7.

year lapse of time from the filing of the complaint to the trial was presumptively prejudicial.

¶12 We therefore consider the reasons for the delay and whether they are attributable to the defendant or the State. The State concedes that "the majority of the delay is attributable to the State, in large part due to the delay caused while awaiting the decision in regard to the twelve-person jury … [and] the delay caused by the request for the adjournment due to the unavailability of witnesses …." However, both Highman and the State agree that the State did not deliberately attempt to delay the trial in order to hamper the defense. Therefore, both agree the second factor weighs against the State, although less heavily than had the State attempted to hamper Highman's defense. *See* ***id.*** at ¶9.

¶13 The third factor is whether and when Highman asserted his right to a speedy trial. It is the duty of the State, not the defendant, to bring the defendant to trial. ***Hadley v. State***, 66 Wis. 2d 350, 361, 225 N.W.2d 461 (1975) (citation omitted). However, the defendant has some responsibility for asserting the right to a speedy trial. ***Id.*** The trial court determined that Highman did not assert this right until he filed the motion asking for a dismissal in May 1999, and the court considered that this weighed against Highman. Highman argues that the court overlooked Highman's conduct preceding the May 1999 motion. He points out that in his August 26, 1997 letter to the court, in addition to asking that not guilty pleas be entered on his behalf, he also asked the court to schedule a trial date and mail the notice to him. Highman also notes that a call from his counsel's office to the clerk was responsible for getting the case back on the calendar in February 1999. He asserts these actions, as well as the May 1999 motion, weigh in his favor.

¶14 We have a different assessment of the third factor than has Highman. We view his August 1997 letter requesting a trial date as having little significance since he shortly thereafter requested an adjournment to obtain counsel, did obtain counsel, and his counsel did not pursue a request for an immediate trial date. In addition, although it was the State that asked the court to consider withholding a decision on Highman's motion for a twelve-person jury until the supreme court ruled on the same issue, Highman's attorney expressed no objection or reservation to that request, although he had plenty of opportunity to do so during the discussion on the anticipated date of the supreme court's ruling. If Highman wanted to assert his right to a speedy trial rather than wait for the supreme court ruling, he could have done so at that time. Similarly, although it is true it was Highman's counsel's office that brought the case to the clerk's attention in February 1999, there was no need to wait for eight months after the ***Hansford*** decision if Highman wanted a speedy trial with a jury of twelve persons. We therefore agree with the trial court's assessment of the record—that Highman did not assert his right to a speedy trial until May 1999, when he asked to have the charges dismissed—and we agree that this weighs against dismissal of the charges.

¶15 Finally, we consider whether the delay resulted in prejudice to Highman. We do this in light of the interests that the speedy trial guarantee is designed to protect: (1) preventing pretrial incarceration, (2) minimizing the defendant's anxiety, and (3) limiting the possibility that the defense will be impaired. ***Leighton***, 2000 WI App 156 at ¶22. Of these, impairment to the defense is the most serious. ***Id.*** at ¶23.

¶16 Highman was not incarcerated while waiting for trial. The trial court found he experienced some anxiety but it was not substantial. Highman does not challenge that assessment and we accept it. Highman's argument on prejudice

focuses on what he asserts are impairments to his ability to defend himself on the OWI and PAC charges.[6] He contends: (1) the medical technician who drew his blood had no recollection of his demeanor or attitude, and (2) the arresting officer was unable to recall the speed at which Highman was driving when the officer stopped him, whether Highman replaced his sandals after the one-legged stand test, and how far apart Highman's heels and toes were during the test. Highman acknowledges that the officer had prepared a report that he used to refresh his recollection; however, Highman asserts the passage of time made it difficult to question the completeness and accuracy of the report. Highman maintains that this fading of witnesses' memories was particularly significant because Highman's defense was "to focus on small, telling facts to argue that [he] was not impaired and that the blood test was not accurate."

¶17 In order to address these arguments, we first summarize the trial testimony. There were three witnesses at the trial, all presented by the State: the arresting officer, the medical technician who drew Highman's blood, and a chemist from the State Laboratory of Hygiene.

¶18 The officer testified that he had prepared a report of Highman's arrest, which took place on July 26, 1997, shortly after 3:00 a.m. The officer had reviewed the report before testifying, and his testimony was based on his personal recollection, on reading the report, or on both. The officer testified that his practice is to prepare his reports during the tour of duty in which the arrest occurs or the next tour. The officer testified that he was driving behind Highman's

[6] Highman concedes that his defense of operating after revocation was not impaired by the delay because that defense did not depend upon the recollection of any witness.

vehicle and observed Highman's vehicle cross the centerline twice and then come to a complete stop in the lane of traffic. The officer activated his emergency lights to stop Highman. When Highman stepped out of his car, the officer detected a strong odor of intoxicants coming from Highman, his eyes were extremely bloodshot and glassy, and he had a difficult time maintaining his balance. The officer then administered field sobriety tests. He explained to the jury each test, what his instructions to Highman were, how Highman performed on each test, and his opinion that Highman had failed the tests. The officer arrested Highman and took him to Beaver Dam Community Hospital to have a blood sample taken. He observed the medical technician taking the blood sample. The technician sealed and packaged it, including in the package certain identification forms filled out at the time, and gave it to the officer. The sample was then shipped via first class mail to the hygiene lab in Madison.

¶19 The medical technician identified her signature and writing on the "Blood/Urine Analysis" form that indicated that she had taken a blood sample from Highman at 4:25 a.m. on July 26, 1997, at Beaver Dam Community Hospital. She explained the procedure for drawing blood, packaging, sealing, identifying, and giving it to the officer, and stated she used that procedure with Highman. On cross-examination, she testified that she had no specific recollection of drawing Highman's blood or of anything about him, including his demeanor and attitude.

¶20 The chemist identified her signature on the "Blood/Urine Analysis" form. The "Blood/Urine Analysis" form indicated that on July 28, 1997, at 9:36 a.m. she received two specimens of sealed blood labeled as Highman's. She observed nothing indicating the specimens had been tampered with or damaged. She analyzed the specimens for alcohol that day. She explained how she performs this test and stated it was the procedure she would have used for Highman. She

explained the procedure for insuring that the testing instrument is reliable and testified that the instrument was in good working order on July 28, 1997. She testified that the result of the analysis of Highman's blood was .211 grams of alcohol per 100 milliliters of blood and this was documented on the form. She believed it was an accurate result to a reasonable degree of scientific certainty and based on her experience and training. The "Blood/Urine Analysis" form was received into evidence.

¶21 We agree with the trial court that Highman's defense to the OWI and PAC charges was not adversely affected by the delay in scheduling his trial. The critical evidence against him—the amount of alcohol in his blood—did not depend on the recollection of any witness. The details that the officer was not able to remember are not significant, and his inability to remember a few insignificant details does not undermine the reliability of the substance of his report and recollections. The medical technician's inability to remember Highman, including his demeanor and attitude, does not make the analysis of his blood sample less reliable. Highman's assertion that it would have been helpful to Highman if these witnesses had had better recall is entirely speculative: one may just as logically, perhaps more logically, argue that better recall by these witnesses would have been helpful to the prosecution.

¶22 Our assessment of the fourth factor, then, is that the only prejudice to Highman was anxiety from a delayed resolution of the charges, and that anxiety was not substantial. This degree of anxiety is, we conclude, no more than that which would exist in every case and does not favor dismissing the charges.

¶23 Considering and weighing all four factors together, we conclude, as did the trial court, that Highman's right to a speedy trial was not violated.

By the Court.—Judgments and orders affirmed.

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