COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2300-CR **Cir. Ct. No. 01-CT-538**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRIS C. LICHTENBERG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Chris Lichtenberg appeals a judgment of conviction for operating while intoxicated (OWI), third offense, contrary to WIS. STAT. § 346.63(1)(a). Specifically, he claims his right to a speedy trial was

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

violated. He also claims his blood was drawn unconstitutionally.[2] We reject his arguments and affirm the judgment.

Background

¶2 On June 8, 2000, Lichtenberg was stopped, detained, and ultimately cited and arrested for OWI, third offense.[3] He refused a blood test, requesting a breath test instead, and was issued a Notice of Intent to Revoke his operating privileges. He was also cited for a prohibited alcohol concentration (PAC) after his blood was processed. The initial appearance date on his citations was July 27.

¶3 On July 13, Lichtenberg requested a refusal hearing. On July 14, Lichtenberg's counsel served the district attorney with a request for admissions and production of documents. On July 25, the district attorney informed Lichtenberg's counsel that the State was withdrawing the OWI and PAC charges so no appearance would be needed on July 27. Counsel called the district attorney on July 26 to verify this information and was further advised that the OWI and PAC charges would not be prosecuted, that the refusal hearing would not be scheduled, and that Lichtenberg would be notified by summons if the State's position changed. The State submitted an order to that effect on July 26 and the court commissioner approved it on July 31, dismissing the charges without prejudice.

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[2] Lichtenberg concedes that this issue is controlled by ***State v. Krajewski***, 2002 WI 97, 255 Wis. 2d 98, 648 N.W.2d 385. He has included it in his brief to preserve it for further appeal. While we mention related facts *in passim*, we do not conduct a legal analysis.

[3] The original citations are not part of the record. However, the State provides no competing factual summary, so we assume it accepts Lichtenberg's statement of facts.

¶4 On June 27, 2001, the State filed a new criminal complaint and summons charging Lichtenberg with OWI (third) and PAC. The initial appearance was set for July 5, 2001, and a trial was set for the first week in September. Also in July, Lichtenberg filed a motion to dismiss based on the State's "post-arrest delay" and a motion for an extension of time to file motions. The motion to dismiss as well as motions to suppress were heard between October 22, 2001, and January 16, 2002. The court denied them all. A jury trial was held on April 29, 2002. Lichtenberg was convicted of OWI and PAC, and he was sentenced on May 29, 2002.[4]

Analysis

¶5 Whether the right to a speedy trial has been violated is a constitutional question we review de novo, although we will uphold a trial court's underlying findings of historical fact unless they are clearly erroneous. ***State v. Leighton***, 2000 WI App 156, ¶5, 237 Wis. 2d 709, 616 N.W.2d 126.

¶6 In determining whether a defendant has been denied the right to a speedy trial, we consider four factors: (1) the length of the delay; (2) the reason for the delay and whether the State or the defendant is more to blame; (3) whether the defendant asserted his right to a speedy trial; and (4) whether the delay resulted in prejudice to the defendant. ***Id.*** at ¶6.

[4] The refusal proceedings were dismissed, and the court changed the jury verdict on the PAC, entering a judgment of not guilty.

Length of the Delay[5]

¶7 The United States Supreme Court has concluded that as the delay between an official accusation—such as an arrest or an indictment—and trial approaches one year, such a delay is presumptively prejudicial. *See* ***id.*** at ¶7 (citing ***Doggett v. United States***, 505 U.S. 647, 651 (1992)). In a misdemeanor case in Wisconsin, our speedy trial statute requires the trial to begin within sixty days of the defendant's initial appearance. WIS. STAT. § 971.10(1).[6] This time period, of course, may be waived. The delay here was from July 5, 2001, to April 29, 2002—just slightly under ten months. The delay is insufficient to raise a presumption of prejudice and, as will be discussed below, Lichtenberg is not totally blameless for the delay.

The Reason for the Delay

¶8 Lichtenberg claims there is no explanation for the State's delay. His complaint, however, is largely premised on the gap between the June 2000 citation

[5] Lichtenberg focuses on the period between his initial citation in June 2000 and the refiling of charges in June 2001. He argues solely under the speedy trial standard, but his right to a speedy trial in a misdemeanor case was not implicated until he made his initial appearance. *See* WIS. STAT. § 971.10(1) (trial for a misdemeanor must be held within sixty days of initial appearance). There was no initial appearance in 2000 because the case was dismissed, a fact Lichtenberg ignores throughout his brief.

Lichtenberg does not pursue a due process or charging delay argument here, although he indicates in a footnote that he raised a due process issue in the trial court. However, constitutional points merely raised before us but not argued will not be reviewed. ***Dumas v. State***, 90 Wis. 2d 518, 523, 280 N.W.2d 310 (Ct. App. 1979). Lichtenberg fails to argue that the State could not reinstate charges against him, and he fails to argue that the statute of limitations had expired. In any event, he would ultimately fail on a charging delay claim.

[6] The record indicates that the trial was first scheduled for September 5, 2001. Although this is actually sixty-two days, Lichtenberg does not challenge this initial delay. We suspect the trial court simply substituted "two months" for "sixty days" since the initial appearance was on July 5.

and the June 2001 refiling. This delay we do not consider. As for the delay between the July 2001 initial appearance and the April 2002 trial, it appears that the delay was due, at least in part, to Lichtenberg's various motions. When he filed a motion to dismiss on July 16, 2001, he also requested an extension to file other motions. He claims the court then granted a continuance at the State's request, but points to nothing indicating the State actually was the requesting party. Even assuming this is so, he points to nothing in the record to indicate he objected to the continuance. The court ordered briefing on certain of Lichtenberg's motions, setting a November deadline for Lichtenberg's first brief. Again, Lichtenberg points to no recorded objection.

¶9 "A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government." ***Leighton***, 2000 WI App 156 at ¶9 (citation omitted). A neutral reason for a delay, such as negligence or crowded courts, should be weighted less heavily against the State than a deliberate attempt to hamper the defense. ***Id.*** While the State may have taken longer than Lichtenberg would have preferred—or even longer than generally accepted—to respond to discovery requests or other motions, Lichtenberg alleges no attempt by the State to deliberately impede his ability to defend himself. Our review of the record indicates a rather normal court process of motions, hearings, and briefings before arriving at trial. Nothing in the record suggests the State was any more responsible for the delays than Lichtenberg.

Assertion of the Right to a Speedy Trial

¶10 Lichtenberg claims this factor clearly weighs in his favor because he did not waive his right and because once he made an appearance in court, he raised the delay as an issue. This, however, is insufficient.

¶11 While a defendant has no duty to bring himself to trial, the defendant has some responsibility to assert the right to a speedy trial. ***Id.*** at ¶20. Requiring some assertion of the right is necessary to distinguish cases where there is evidence the defendant did not want to be brought to trial. ***Id.*** Raising the delay as a defense on the day of trial without mentioning it earlier in the proceedings also fails to constitute an assertion of the right because it is, in essence, a retroactive assertion. The court cannot turn back the clock and provide a defendant with a faster trip through the judicial system.

¶12 In this case particularly, raising the issue of the delay from the dismissal of the first case to the recharging would be irrelevant since during that period, no trial was pending. Indeed, we wonder when, how, and to whom Lichtenberg could have asserted his speedy trial right. Additionally, we reiterate that as the trial court was scheduling motion hearings and briefing, nothing indicates that Lichtenberg objected to the expanding timetable. In effect, Lichtenberg waived his right to a trial within sixty days of his initial appearance.

Prejudice from the Delay

¶13 When we consider whether a defendant has been prejudiced by a delay in trial, we must consider these interests: (1) preventing oppressive pretrial incarceration; (2) minimizing the accused's anxiety and concern; and (3) limiting the possibility the defense will be impaired. Lichtenberg was never incarcerated. Lichtenberg also does not claim that he suffered any undue anxiety. We have no doubt that he suffered some anxiety, but no judicial mandate could ever wholly eliminate that circumstance from the criminal justice system.

¶14 There are three primary ways in which a defense can be impaired: witnesses may die or disappear, witnesses may lose their ability to recall events, or

a defendant may be hindered in his ability to gather evidence. ***Id.*** at ¶23. No one suggests here that any witnesses died or disappeared.

¶15 The only witnesses would have been Lichtenberg, two officers, and possibly the laboratory personnel who drew and analyzed his blood. Lichtenberg does not indicate what "forgotten" testimony these witnesses had that could have helped him.

¶16 Lichtenberg does suggest his ability to gather evidence was hampered because a dispatch tape his attorney had requested before the case was dismissed in 2000 had been recorded over or destroyed by the police.[7] He does not, however, tell us what he hoped to find on the tape. Thus, without more of an idea of exactly how Lichtenberg's defense was hampered, we cannot conclude that he was prejudiced.[8]

Conclusion

¶17 Lichtenberg cannot benefit from a presumption of prejudice because the delay between his initial appearance and his trial was only ten months, and the presumption does not arise until one year has passed. Nothing indicates the State was more responsible for this delay than Lichtenberg, nor is there any indication the State tried to cause a delay so as to hamper Lichtenberg's defense. Lichtenberg failed to affirmatively assert his right to a speedy trial and, even if he

[7] The police department's policy is to reuse tapes after 120 days.

[8] Under ***Leighton***, a defendant need not always show he was prejudiced in fact. ***Leighton***, 2000 WI App 156, ¶25, 237 Wis. 2d 709, 616 N.W.2d 126; *see also* ***Hadley v. State***, 66 Wis. 2d 350, 364, 225 N.W.2d 461 (1975). This exception, however, applies when delays are not attributable to the defendant. As mentioned above, the record indicates that some of the pretrial delay was due to Lichtenberg's motions.

did not waive the right when asked at the initial appearance, he never objected to the court's scheduling of hearings outside the sixty-day requirement of WIS. STAT. § 971.10(1). Finally, Lichtenberg has not shown he was prejudiced in any way by the delay.

By the Court.—Judgment affirmed.

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