COURT OF APPEALS
DECISION
DATED AND FILED

May 19, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP802-CR **Cir. Ct. No. 2008CF406**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY C. THIEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed*.

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

¶1 PER CURIAM. Timothy C. Thiel appeals pro se from a judgment convicting him of one count each of possession of tetrahydrocannabinol (THC),

second or greater offense, and manufacture/delivery of THC. None of his appellate arguments are persuasive. We affirm.[1]

¶2 According to trial and hearing testimony, City of Sheboygan Police Investigator Scott Reineke received a call from Thiel's landlady, reporting that she discovered about 100 marijuana plants growing in Thiel's apartment. The landlady told Reineke that she entered the apartment because a fire alarm was going off and Thiel was not there. She also said that Thiel returned shortly after but soon left again on his bicycle with several bags on his back. She described Thiel's attire. Reineke radioed the information to Mark Viglietti, a City of Sheboygan police officer. When Reineke arrived, Viglietti had a person who matched Theil's description handcuffed and "very agitated" on the sidewalk. A bicycle and bags lay nearby. Reineke testified that the bags had fallen open and he "could just look down" and see numerous Dixie cups containing what he recognized through his experience as juvenile marijuana plants. A police field test was inconclusive for the presence of THC. At the State Crime Laboratory, all fifty-five plants tested were positive for THC.

¶3 Thiel claimed the seized materials were "law-abiding" wildflowers, cilantro and sprouting coriander seeds and that he was wrongly charged because the field test was inconclusive for THC. A jury convicted Thiel of possession and manufacture of THC. Thiel then filed a "mistrial motion to dismiss" prompted by the court's refusal at trial to secure as witnesses the landlady and the police officer who drafted the criminal complaint, but also revisiting all of his trial issues. The

[1] We commend Assistant Attorney General Michael Losse for his clear rendering of the procedural history and the issues. His brief was of immeasurable assistance to this court.

court orally denied the motion at sentencing. Thiel appeals. We will supply other facts as needed to address his appellate issues.

¶4 Thiel first contends the stop was unreasonable and that the trial court erred in denying his motion to suppress the 167 plants, plus seeds sprouting in damp paper toweling, seized in the search of the garbage bags he carried.

¶5 To effect a valid investigatory stop, a law enforcement officer must reasonably suspect in light of his or her experience that criminal activity is afoot. ***Terry v. Ohio***, 392 U.S. 1, 30 (1968); ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990); *see also* WIS. STAT. § 968.24 (2007-08).[2] Reasonable suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." ***Richardson***, 156 Wis. 2d at 139 (citation omitted). The reasonableness of an investigatory stop is determined by examining the totality of circumstances. ***Id.***

¶6 Viglietti testified that he was in uniform in a marked squad when he observed a person matching Thiel's description on a bicycle carrying bags, that he had been advised to watch for such a person, that police had been informed that the person was growing marijuana in his apartment, and that, ignoring his order to pull over, Thiel instead looked back and pedaled faster. When forced to stop, Thiel became agitated, screamed and appeared as if he intended to flee. Viglietti arrested him for obstructing. Thiel contended he did not resist but "stopped politely on the sidewalk." This credibility determination was for the trial court and is not clearly erroneous. *See* ***State v. Bermudez***, 221 Wis. 2d 338, 346, 585

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

N.W.2d 628 (Ct. App. 1998). Once Thiel was arrested, a search of him and the immediate area were proper. *See* ***State v. Young***, 2006 WI 98, ¶54, 294 Wis. 2d 1, 717 N.W.2d 729; *see also* WIS. STAT. §§ 968.10, 968.11(3).

¶7 The trial court found that the landlady was not an agent of the State, that her entry into the apartment was lawful and the evidence found on Thiel was properly seized. These findings are not clearly erroneous. The court also opined that, although Viglietti opted for a ***Terry*** stop, he had probable cause to arrest Thiel on a drug offense. We reject Thiel's argument that Viglietti did not have reasonable suspicion to conduct an investigatory stop. We affirm the denial of Thiel's motion to suppress.

¶8 Thiel next contends there was insufficient probable cause to bind him over for trial. The right to a preliminary examination is solely a statutory right. ***State v. Dunn***, 121 Wis. 2d 389, 394, 359 N.W.2d 151(1984). The purpose of a preliminary examination is to determine if there is probable cause to believe the defendant committed a felony. WIS. STAT. § 970.03(1). If so, the court must bind the defendant over for trial. Sec. 970.03(7). Probable cause at a preliminary hearing is satisfied when there exists a believable or plausible account of the defendant's commission of a felony. ***Dunn***, 121 Wis. 2d at 398.

¶9 We are satisfied that probable cause existed to bind Thiel over. We need not examine the matter any further, however. A conviction resulting from a fair, error-free trial effectively cures any error at the preliminary hearing. ***State v. Webb***, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991). A defendant who claims that error occurred at the preliminary hearing may obtain relief only before trial, and must seek leave to appeal the bindover decision. ***Id.*** Thiel's failure to do so forecloses this effort here.

¶10 Thiel also contends that his statutory and constitutional rights to a speedy trial were violated, concentrating on the statutory aspect. Under WIS. STAT. § 971.10(2)(a), the trial of a defendant charged with a felony "shall commence within 90 days from the date trial is demanded." The demand may not be made until after the information or indictment is filed. ***Id.***

¶11 Here, the information was filed on July 16, 2008; Thiel filed his speedy trial motion on July 18 and was tried approximately seven months later on February 24, 2009. Nonetheless, this argument fails. Thiel's competency was at issue from the outset. On September 10, 2008, he was found incompetent and was committed until December 11 for treatment to competency. The trial court concluded that the speedy trial demand's time limits were tolled until December 11. Other delays were occasioned by a series of attorneys either quitting or being fired and Thiel's choice to represent himself. The months of competence-related delays were intrinsic to the case and the counsel-related delays were occasioned by Thiel himself. Neither such delay is counted. ***State v. Urdahl***, 2005 WI App 191, ¶26, 286 Wis. 2d 476, 704 N.W.2d 324.

¶12 Further, the delays generated by the competence examinations and treatment could be construed as continuances because the court attempted to maintain the trial date while addressing Thiel's own counsels' concerns as to his competence. *See* WIS. STAT. § 971.10(3)(a). Ultimately, however, we agree that the ninety-day time limit was tolled until Thiel was declared competent on December 11. As his trial was held seventy-five days later, there was no statutory speedy trial violation.

¶13 The constitutional right to a speedy trial was outlined in ***Barker v. Wingo***, 407 U.S. 514, 530 (1972), and ***Day v. State***, 61 Wis. 2d 236, 212 N.W.2d

489 (1973). These cases teach that we must determine on a case-by-case basis whether a defendant's right to a speedy trial has been violated, assessing the length of delay, the reason for it, whether it prejudiced the defendant and whether a demand for a speedy trial was made. ***State ex rel. Rabe v. Ferris***, 97 Wis. 2d 63, 67, 293 N.W.2d 151 (1980). We review the claim de novo. *See* ***State v. Borhegyi***, 222 Wis. 2d 506, 508, 588 N.W.2d 89 (Ct. App. 1998).

¶14 We see no constitutional violation. Thiel merely alleges that his constitutional right to a speedy trial was violated but makes no argument in that regard. For the reasons discussed above, we conclude the time limits were tolled such that no "presumptively prejudicial" delay resulted. Accordingly, we need not inquire into the other ***Barker*** factors. *See* ***Borhegyi***, 222 Wis. 2d at 510.

¶15 Thiel next claims he was denied his constitutional right to confront his accusers because the trial court purposefully failed to assist him in compelling the attendance of his witnesses. *See* WIS. STAT. § 885.10. We disagree.

¶16 To secure the trial court's assistance, an indigent defendant must make "a plausible showing that the proposed witnesses are both material and favorable to his or her defense, *i.e.*, necessary." *See* ***State ex rel. Dressler v. Circuit Court for Racine County***, 163 Wis. 2d 622, 640, 472 N.W.2d 532 (Ct. App. 1991). If the defendant makes the necessary showing, the trial judge "may direct the witnesses to be subpoenaed as he or she determines is proper and necessary." WIS. STAT. § 885.10; s*ee* ***State ex rel. Dressler***, 163 Wis. 2d at 639.

¶17 Thiel prepared subpoenas for fourteen witnesses, among them his landlady; the person who reported the fire alarm to the landlady; Joe Piekarski, who accompanied the landlady into Thiel's apartment; the landlady's handyman; a maintenance person; the crime lab chemist; the assistant district attorney who

prepared the search warrant; the police officer who filed the complaint; five other police officers; and a person Thiel said would testify as an expert about smoking products that look like marijuana but contain no THC.

¶18 The court ordered that Piekarski be produced. Piekarski's testimony not only was unfavorable to Thiel's defense, it also pertained to items he saw in Thiel's apartment, evidence the court had suppressed.[3] Thiel was able to question the chemist and the five police officers with personal knowledge of the case because the State produced them. The testimony of the other proposed witnesses connected to Thiel's apartment—the landlady; the person who reported the alarm; and the landlady's employees—would have involved the suppressed evidence found there. The officer who drafted the complaint could not have testified because he based the complaint on Reineke's report, matters of which the drafting officer did not have personal knowledge. *See* WIS. STAT. § 906.02. Accordingly, their testimony was neither relevant nor necessary.

¶19 The court also opined that WIS. STAT. § 885.10 did not oblige it to help procure a non-transactional witness. Still, the court placed a phone call in open court to Thiel's proposed "expert." The person who answered stated that the person Thiel sought had died. Even assuming Thiel made a showing of a

[3] The trial court had granted Thiel's motion to suppress evidence discovered pursuant to a warrantless post-arrest "protective sweep" of Thiel's apartment. Four officers conducted the sweep, assertedly to verify that no one else was inside destroying evidence. They seized over two dozen marijuana "root systems," potting soil, baggies and a digital scale. The court concluded that some of the officers could have secured the apartment while the others got a warrant.

particularized need, the trial court has the discretion, not an unequivocal duty, to help a defendant procure an expert. *See* ***State ex rel. Dressler***, 163 Wis. 2d at 641.

¶20 We also reject Thiel's claim that there was insufficient evidence to support his conviction because the State failed to prove beyond a reasonable doubt that the seized plants contained THC. The standard for reviewing the sufficiency of the evidence to support a conviction is whether, after viewing the evidence in the light most favorable to the State and the conviction, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). If the facts support more than one inference, we must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law. ***Id.*** at 506-07. Applying this standard, we conclude that the evidence is sufficient to support the guilty verdicts beyond a reasonable doubt. *See* ***State v. Block***, 222 Wis. 2d 586, 596, 587 N.W.2d 914 (Ct. App. 1998).

¶21 To convict Thiel of possession of THC required the State to establish beyond a reasonable doubt that: (1) Thiel possessed—knowingly had physical control of—a substance; (2) the substance contained THC; and (3) Thiel knew or believed the substance was THC. *See* WIS JI—CRIMINAL 6030. To convict him of manufacture of THC, the State had to prove beyond a reasonable doubt that: (1) Thiel manufactured or produced a substance; (2) the substance was THC; and (3) Thiel knew or believed that the substance was THC. *See* WIS JI—CRIMINAL 6021. Trial evidence was sufficient to establish each of these elements.

¶22 Testimony at trial refuted Thiel's unsworn claim that the plants were herbs and wildflowers. Three police officers testified that, from their experience,

they recognized the plants in the bags as young marijuana plants. One officer testified that the field test is only "presumptive" and commonly is inconclusive, which is why the crime lab test results are used in court to prove the presence of THC. The drug identification chemist testified that all fifty-five of the plants tested at the State Crime Lab were positive for THC. She also testified that a field test may be inconclusive for the presence of THC in small marijuana plants because the concentration is less than in mature plants. The jury inferred that Thiel knew he was growing marijuana plants containing THC. The evidence supporting that inference was not incredible as a matter of law.

By the Court.—Judgment affirmed.

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