COURT OF APPEALS DECISION DATED AND FILED

December 27, 2013

Diane M. Fremgen
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1576-CR **Cir. Ct. No. 2010CT2647**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS A. JAHNKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: NELSON W. PHILLIIPS III and CAROLINA STARK, Judges. *Affirmed*.

¶1 FINE, J. Thomas A. Jahnke appeals the judgment convicting him on his guilty plea to drunk driving as a third timer. *See* WIS. STAT.

§ 346.63(1)(a).[1] He also appeals the circuit court's order denying his motion for postconviction relief without holding an evidentiary hearing.[2] Jahnke contends that the lawyers who represented him when he pled guilty gave him constitutionally ineffective representation because they did not seek dismissal of the drunk-driving charge because of a two-and-one-half year delay between his arrest and the filing of the criminal complaint. We affirm.

I.

¶2 Police arrested Jahnke for drunk driving on March 20, 2008. The criminal complaint was not filed, however, until November 9, 2010. According to the criminal complaint, which Jahnke accepted as true at his plea hearing, Jahnke rear-ended a bus. An ambulance took him to a hospital where a chemical test of his blood revealed, as set out in the criminal complaint, that it "contained .333% weight of alcohol."

¶3 As noted, Jahnke's motion for postconviction relief alleged that he was deprived of constitutionally effective legal representation because his lawyers, as phrased by Jahnke's motion for postconviction relief, "failed to argue that his constitutional right to a speedy trial was violated by the over two-and-one-half year delay between his arrest and the filing of the complaint." The postconviction motion conceded that after Jahnke left the hospital following his arrest, he "remained out of custody on this case until after the State filed the complaint." He

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[1] Thomas A. Jahnke pled guilty before the Honorable Nelson W. Phillips, III, who sentenced him to, among other restrictions, a six-month jail term.

[2] The Honorable Carolina Maria Stark entered a written decision and order denying Jahnke's motion for postconviction relief.

repeats this concession on appeal: "Mr. Jahnke was not incarcerated in this case until well after the filing of the complaint, and therefore cannot assert that he was prejudiced by oppressive pretrial incarceration during the time period between his arrest and the filing of the complaint." Jahnke was released on a personal recognizance bond, which was later modified to cash bonds because Jahnke had twice failed to appear for court hearings. Jahnke had posted and forfeited the first cash bond.

¶4 The parties agree that by the time the State filed its criminal complaint against Jahnke, Jahnke's blood sample, from which the .333% analysis was derived, had been destroyed. The circuit court, The Honorable Nelson W. Phillips, III, presiding, denied Jahnke's motion to suppress the .333% analysis, and Jahnke does not argue on this appeal that that decision was wrong, and also did not assert that argument in his motion for postconviction relief. Rather, Jahnke's postconviction motion focused on the "personal anxiety" it claims he suffered during the delay. This is how the postconviction motion set out the nub of Jahnke's "personal anxiety" contention:

> During the over two-and-a-half year period from the arrest to the filing of the complaint, Mr. Jahnke took it upon himself to address his alcohol problem. As a hearing on this motion, Mr. Jahnke would testify that he participated in and completed numerous AODA treatment programs between the time of his arrest and the filing of the complaint in 2010 in an attempt to rehabilitate himself. The State's delay in prosecution caused him anxiety because—due to the length of delay between his arrest and the State filing the complaint—he faced prosecution after he had already taken it upon himself to address the alcohol problem that resulted in the charged behavior.

Although Jahnke's motion alluded to the possibility that the delay "also prejudiced Mr. Jahnke's ability to pursue all bases for a defense in this case," specifically the destruction of the blood sample, the postconviction motion, as we have already

seen, specifically conceded that "Mr. Jahnke does not at this point challenge this Court's [that is, the circuit court] ruling on" Jahnke's motion to suppress evidence of his blood-alcohol level." His appellate brief notes, amorphously, that he "did not challenge the circuit court's decision on this [suppression] motion, and does not challenge it here on appeal. … Mr. Jahnke now does not know whether testing the blood sample would have been helpful, as the sample has been destroyed."

II.

¶5 This appeal lies at the intersection of two important constitutional rights: the right to a speedy trial and the right to effective legal assistance. Although the speedy-trial right is forfeited by a valid guilty plea, *see* ***State v. Asmus***, 2010 WI App 48, ¶5, 324 Wis. 2d 427, 431, 782 N.W.2d 435, 437, after sentencing a defendant may still withdraw a guilty plea in order to correct a "manifest injustice." *See* ***State v. Bentley*,** 201 Wis. 2d 303, 311, 548 N.W.2d 50, 54 (1996). "[T]he 'manifest injustice' test is met if the defendant was denied the effective assistance of counsel." ***Ibid.***

¶6 To establish constitutionally deficient representation, a defendant must show: (1) deficient representation; and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 68 (1984). To prove deficient representation, a defendant must point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." ***Id.***, 466 U.S. at 690. To prove prejudice, a defendant must demonstrate that the lawyer's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.***, 466 U.S. at 687. Thus, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***, 466 U.S. at 694. This is not, however, "an outcome-determinative test. In decisions following ***Strickland***, the Supreme Court has reaffirmed that the touchstone of the prejudice component is 'whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.'" ***State v. Smith***, 207 Wis. 2d 258, 276, 558 N.W.2d 379, 386 (1997) (citations and quoted source omitted). Further, we need not address both aspects of the ***Strickland*** test if the defendant does not make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697. Legal conclusions on both aspects of the ***Strickland*** test are matters that we review *de novo*. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845, 848 (1990).

¶7 A criminal defendant's speedy-trial right under the Sixth Amendment ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial…") (applicable to the States *via* the Fourteenth Amendment, ***Kloper v. North Carolina***, 386 U.S. 213, 223 (1967)), is assessed under the following standards: the length of the delay, the reason for the delay, the defendant's timely assertion of the speedy-trial right, and any actual prejudice to the defense from the delay, ***Barker v. Wingo***, 407 U.S. 514, 530 (1972). The "prejudice" aspect is measured against three main interests: (1) "oppressive pretrial incarceration"; (2) "anxiety and concern of the accused;" and (3) impairment of the defendant's ability to mount a defense. ***Id.***, 407 U.S. at 532 (1972). For the purposes of this appeal, we will assume that the assessment of these interests was triggered by the lengthy delay here. *See* ***Doggett v. United States***, 505 U.S. 647, 652 n. 1, (1992) (a twelve-month delay between charging and trial is considered presumptively prejudicial: "unreasonable enough to trigger

the ***Barker*** enquiry"); ***State v. Lemay***, 155 Wis. 2d 202, 212–213, 455 N.W.2d 233, 237 (1990) (Presumptive prejudice does not establish actual prejudice; rather, it "triggers further review of the allegation under the other three ***Barker*** factors.").

¶8 As we have seen, Jahnke has disclaimed reliance on the "oppressive pretrial incarceration" element, and has essentially done the same with its undeveloped reference to the impairment-of-ability-to-defend element. *See* ***State v. Jackson***, 229 Wis. 2d 328, 337, 600 N.W.2d 39, 43 (Ct. App. 1999) ("A party must do more than simply toss a bunch of concepts into the air with the hope that either the trial court or the opposing party will arrange them into viable and fact-supported legal theories."), *grant of habeas corpus rev'd sub nom.* ***Jackson v. Frank***, 348 F.3d 658 (7th Cir. 2003), *cert. denied*, 541 U.S. 963. Rather, he relies on the "anxiety and concern" element. Looking at his claimed "anxiety" we see in his submissions only a spur to rehabilitation. As a matter of public policy and common sense that can hardly be the type of oppressive anxiety implicated by even a presumptively prejudicial speedy-trial deprivation, unless there are other circumstances not present in this case. Indeed, the prejudice component of the deprivation of speedy court process has focused on whether that would "*adversely*" affect the person's prospects for rehabilitation. *See* **Strunk v United States**, 412 U.S. 434, 439 (1973) (emphasis added). Thus, post-conviction and pre-sentence rehabilitation is often asserted a reason for sentencing leniency. Here, Jahnke was at liberty without cash bond until he did not appear at scheduled court hearings, and, until he forfeited the first cash bond, he was free to go about his business and rehabilitation efforts. Accordingly, he has not shown ***Barker*** prejudice; *a fortiori* he has not shown that under the circumstances his lawyers' failure to assert his speedy-trial right and seek dismissal of the complaint prejudiced him under the ***Strickland*** standard.

¶9 We affirm.

By the Court.—Judgment and order affirmed.

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