COURT OF APPEALS
DECISION
DATED AND FILED

July 6, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2630-CR **Cir. Ct. No. 2012CF159**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL J. ASCHENBRENNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Wood County: JON M. COUNSELL, Judge. *Reversed and cause remanded with directions.*

Before Lundsten, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Michael Aschenbrenner appeals a judgment of conviction and an order denying his motion for postconviction relief. The issue is whether his constitutional right to a speedy trial was violated. We conclude that it was and, therefore, we reverse and remand with directions to dismiss the charges with prejudice.

¶2 After a jury trial, Aschenbrenner was convicted of four felony counts of bail jumping and one felony count of operating with a prohibited alcohol concentration. In his postconviction motion, Aschenbrenner argued for dismissal of the charges due to a violation of his constitutional right to a speedy trial. The circuit court denied the motion.

¶3 Aschenbrenner renews his speedy trial argument on appeal. The parties agree that we should apply a four-part balancing test in which we consider: "(1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant." ***State v. Urdahl***, 2005 WI App 191, ¶11, 286 Wis. 2d 476, 704 N.W.2d 324. This is a question of law, which we review de novo, although we accept the circuit court's findings of fact unless those findings are clearly erroneous. ***Id.***, ¶10.

¶4 Regarding the first factor, the length of delay, the parties agree that this should be measured starting from Aschenbrenner's arrest in March 2012. The State argues that the end date should be the start of trial in March 2014. Aschenbrenner acknowledges a recent federal case supporting the State's view, but asks that we include a further five months after trial, until sentencing, based on the state constitution. However, this is merely a request with no significant supporting argument. Thus, we limit our assessment to the time from arrest to

trial, which is approximately 24 months. As to this time period, the parties agree that it is considered presumptively prejudicial. *See* ***id.***, ¶12.

¶5 As to the third factor, Aschenbrenner's assertion of his speedy trial right, the State does not dispute that Aschenbrenner sufficiently asserted that right.

¶6 The parties focus our attention on factor two, the reason for the delay, and factor four, prejudice. Regarding these factors, we ordered supplemental briefing, directing the State to address Aschenbrenner's heavy reliance on ***State v. Borhegyi***, 222 Wis. 2d 506, 588 N.W.2d 89 (Ct. App. 1998). The State's brief-in-chief did not discuss ***Borhegyi***. With the benefit of further briefing, we conclude that the analysis in ***Borhegyi*** compels the conclusion that reversal is necessary in this case. Although we might reach a different conclusion if we were writing on a clean slate, we are not at liberty to ignore ***Borhegyi***.

¶7 Before we discuss and compare ***Borhegyi*** in terms of the reason for the delay and prejudice, we further clarify that, of the 24 months between arrest and trial, we focus on just 17 months. The difference between 24 months and 17 months is 7 months. The parties discuss and sometimes dispute who is responsible for various parts of these 7 months. We need not resolve any disputes they have in this regard. Even if we attributed all 7 months of the delay to Aschenbrenner, we would still reverse because the State has not sufficiently explained away the remaining 17 months of delay. As we shall see, this 17-month period is comparable to the 14-month period that was cause for reversal in ***Borhegyi***.

¶8 In ***Borhegyi***, the total delay from arrest to trial was 17 months. ***Id.*** at 512. The State explained that a 3-month delay of trial, from July to October 1996, was due to the court's need to try a juvenile case with a time limit. ***Id.*** at 513. Other than that, so far as the ***Borhegyi*** decision reveals, the State did not suggest

reasons for the delay. Thus, that left unexplained 14 months of the total 17-month period between arrest and trial. We concluded in ***Borhegyi*** that the State's "failure to even offer an explanation for such a substantial delay exceeds negligence and evinces a cavalier disregard of Borhegyi's speedy trial right." ***Id.***

¶9 The State argues that the situation here is different because the State has offered several explanations for the delays. However, as we discuss next, those explanations are largely no more than speculation.

¶10 The State's supplemental brief includes a calculation of the number of days of delay that the State believes can properly be attributed to it. The State concedes that out of the first 14 months or so, 215 days (about 7 months) should be attributed to the State. The State then argues that *none* of the remaining 312 days (about 10 months) should be attributed to it. The State breaks those 312 days into two sections.

¶11 The first section is 141 days, from May 2013, when Aschenbrenner was appointed new counsel, to an October 2013 hearing, when he was expected to plead guilty but did not. The State asserts: "Although the defense may not have formally asked for time to prepare for trial, this is surely what effectively happened." However, there is no indication that this is a particularly complicated case, and we find no indication of the time that defense counsel needed to prepare. The notion that defense counsel needed 141 days to prepare is pure speculation on the State's part. For that matter, the State cites nothing in the record explaining how or why the October 2013 plea hearing date was set. Thus, even assuming that new counsel needed some time to prepare, the State leaves unexplained most of this first 141-day time period.

¶12 As it turned out, Aschenbrenner did not enter a plea in October 2013. The second time period the State addresses is the 171 days from the scheduled October 2013 hearing date to the trial date in March 2014. Again the State speculates. The State asserts: "[I]t is again unreasonable to suggest that the parties, the witnesses, and the court find a mutually acceptable date to try the case much sooner than the March date that was arrived upon." The State provides no discussion of record information about how or why the eventual trial date was set. Our independent review of the record finds no significant information regarding this period of delay.

¶13 In short, although the State purports to explain this 312-day period, it offers only speculation without record support. It is not apparent how this is different than the lack of explanation that the State gave in ***Borhegyi***. We could have speculated in ***Borhegyi*** about various plausible and acceptable reasons for the delay, but we did not, and we decline to accept speculation here. The State has cited no case law holding that delays for unknown reasons should not be attributed to the State. ***Borhegyi*** implicitly rejects such an approach.

¶14 To be clear, it is not the mere *offering* of explanations that is necessary for the State to distinguish this case from ***Borhegyi***. Rather, the explanations must be supported by the record so as to be more than mere speculation.

¶15 If we assume some preparation time was needed, it remains true that most of those last 312 days of delay should be added to the earlier 215 days that the State concedes. Thus, the total delay attributed to the State is something close to 17 months. That is longer than the 14-month period of unexplained delay we attributed to the State in ***Borhegyi*** that was cause for reversal.

¶16 Turning to the last factor, prejudice, once again ***Borhegyi*** supports Aschenbrenner's request for reversal.

¶17 The speedy trial right is intended to serve three goals: (1) prevention of oppressive pretrial incarceration; (2) minimization of the defendant's anxiety and concern; and (3) limitation of impairments to the defense. ***Id.*** These are the factors to be considered when deciding prejudice.

¶18 In ***Borhegyi***, we held that sufficient prejudice was shown even though we did not decide whether the defendant suffered actual prejudice to his defense. We concluded that because Borhegyi was in custody for the entire period, those 17 months of incarceration, with the attendant anxiety and concern about the charges, supported a speedy trial violation. *See* ***id.*** at 514-18.

¶19 Here, the parties agree that Aschenbrenner was in custody for the entire period from arrest to trial. As discussed above, this time in custody was longer than in ***Borhegyi***. Therefore, ***Borhegyi*** compels the conclusion that Aschenbrenner has shown prejudice.

¶20 As noted above, the four-part speedy trial test is a balancing test. Courts must balance the length of delay, reasons for the delay, the defendant's assertion of his speedy trial right, and prejudice. As to this balancing, we are unable to see a meaningful difference between the facts of ***Borhegyi*** and this case.

¶21 In ***Borhegyi***, the total period of delay was 17 months, while here it was longer: 24 months.

¶22 As to the reason for the delay, the period attributed to the State in ***Borhegyi*** was 14 months, while here it is close to 17 months.

¶23 As to the assertion of the defendant's right to a speedy trial, the State has not suggested that there is a meaningful difference between ***Borhegyi*** and this case.

¶24 Finally, as to prejudice, both Borhegyi and Aschenbrenner were in custody, the difference being that Aschenbrenner was in custody longer.

¶25 As should be clear by now, we are unable to reconcile our decision to reverse in ***Borhegyi*** with the State's request that we not reverse here.

¶26 Before concluding, we address the State's reliance on ***Urdahl***, 286 Wis. 2d 476. In ***Urdahl***, we did not reverse the conviction, even though the delay we attributed to the State was about 20.5 months. ***Id.***, ¶¶32, 37. We acknowledge that, looking at only the length of delay attributed to the State, ***Urdahl*** cuts in the State's favor because it was a longer delay than in this case. However, there are two things about ***Urdahl*** that make that case different than both ***Borhegyi*** and the instant case.

¶27 First, in ***Urdahl*** we said that the delay of 20.5 months was due to court calendar congestion, which case law states is "weighted less heavily" against the State. ***Urdahl***, 286 Wis. 2d 476, ¶¶26, 32. That contrasts with ***Borhegyi***, where the lack of explanation was heavily weighted against the State, and here, where we have speculation, rather than an explanation, as to why the time is not almost entirely attributable to the State.

¶28 The second way ***Urdahl*** does not help the State is on prejudice. On this topic, we are unable to reconcile the State's characterization of ***Urdahl*** with our reading of the opinion. Describing ***Urdahl***, the State asserts: "Presuming prejudice, the [***Urdahl***] Court considered the reasons for the lengthy delay."

¶29 We are unable to find any passage in ***Urdahl*** in which we presumed prejudice. Instead, we reviewed the three forms of prejudice that are recognized in the speedy trial context and concluded that, because Urdahl was released on bail for the entire time, the prejudice component was minimal when it came to balancing the factors. *See* ***Urdahl***, 286 Wis. 2d 476, ¶¶34-37. We did not presume prejudice, but instead concluded that prejudice was minimal.

¶30 Regardless of the State's discussion of the prejudice factor in ***Urdahl***, the difference is pronounced. Urdahl was not in custody, while Borhegyi and Aschenbrenner were. This means that Aschenbrenner suffered prejudice akin to Borhegyi, not Urdahl.

¶31 For these reasons, we conclude that, balancing the four factors together, Aschenbrenner's constitutional right to a speedy trial was violated in this case. The State does not appear to dispute that the required remedy is dismissal of the charges. *See* ***Borhegyi***, 222 Wis. 2d at 509-10. Therefore, we reverse the judgment of conviction and remand with directions to dismiss the charges with prejudice.

By the Court.—Judgment and order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).