

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 24, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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Appeal No. 2004AP3205-CR

Cir. Ct. No. 1989CF36

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL E. SCHMITZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sauk County: GUY D. REYNOLDS, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. Paul E. Schmitz appeals a judgment of conviction and an order denying his request for postconviction relief. Schmitz argues that the nearly eleven-year delay between his conviction and his post-appeal resentencing hearing deprived him of his constitutional right to a speedy

trial under U.S. CONST. amend. VI and WIS. CONST. art. I, § 7. Schmitz further argues that he was denied the right to effective assistance of counsel due to his trial counsel's failure to move for the dismissal of his conviction for kidnapping based on the State's failure to comply with WIS. STAT. § 808.08(3) (2003-04).¹ We reject both arguments, and affirm the judgment and order of the trial court.

BACKGROUND

¶2 On February 8, 1990, a jury convicted Schmitz of first-degree murder and of Class A felony kidnapping, party to a crime. On March 21, 1990, the trial court sentenced Schmitz to life terms for each offense, to run consecutively. On May 15, 1991, Schmitz appealed both convictions as well as the court's denial of a postconviction motion.

¶3 In a December 10, 1992 decision, we affirmed the murder conviction and sentencing, but reversed the kidnapping conviction.² *Wisconsin v. Schmitz*, No. 91-1195-CR, unpublished slip op. at 1-2, 9-10, 12-13 (Wis. Ct. App. Dec. 10, 1992). After concluding that there was insufficient evidence to sustain a Class A felony kidnapping conviction, we remanded with instructions to the trial court to enter a conviction for kidnapping as a Class B, rather than a Class A felony, and to re-sentence Schmitz accordingly. *Id.* at 9-10, 12-13. On February 18, 1993, our court entered an order of remittitur and remanded the case to the circuit court.

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

² Schmitz appears to argue that we ordered resentencing on both the murder and kidnapping charge, but a review of our remand instructions in their full context reveals that our discussion of the resentencing remand order was confined to the context of the kidnapping charge. *Wisconsin v. Schmitz*, No. 91-1195-CR, unpublished slip. op. at 1-2, 9-10, 12-13 (Wis. Ct. App. Dec. 10, 1992).

¶4 However, resentencing on the kidnapping charge did not occur for over ten years. On July 15, 2003, the Sauk County Clerk of Courts was contacted by a law student intern at the Red Granite Correctional Facility, and alerted to the delay in sentencing. Sauk County Circuit Court Judge Guy D. Reynolds then sent a letter to the district attorney, informing her that neither the modification nor resentencing on the kidnapping charge had occurred as ordered in 1992, and suggesting that resentencing be scheduled.

¶5 On December 8, 2003, the court finally held a resentencing hearing. During the hearing, Schmitz's attorney objected to the proceeding on the basis that the extraordinary delay in sentencing warranted setting aside the verdict. The trial court denied the objection based on the lack of any harm the delay caused Schmitz, who was already serving a life sentence on the murder charge. Schmitz's attorney did not object to the resentencing hearing under WIS. STAT. § 808.08(3).

¶6 After the hearing, the trial court entered a modified judgment of conviction amending the Class A kidnapping conviction to a Class B kidnapping conviction, and imposing a twenty-year sentence on the kidnapping charge, to run consecutively with the life sentence Schmitz was already serving on the murder charge. Schmitz filed a postconviction motion, alleging ineffective assistance of counsel based on his trial counsel's failure to challenge the resentencing procedure based on WIS. STAT. § 808.08(3), and also claiming his constitutional right to a speedy sentencing was violated. The trial court denied the postconviction motion. Schmitz appeals.

DISCUSSION

¶7 Schmitz raises two issues on appeal. He argues that the circuit court erred in denying his motion for dismissal of the amended kidnapping charge

because his constitutional right to a speedy trial was violated. Specifically, he asserts that the nearly eleven-year delay between the receipt of the remittitur from the court of appeals and his resentencing on the amended kidnapping conviction violated his constitutional right to a speedy trial. Schmitz also argues that his trial counsel's failure to move to dismiss the action because the State failed to comply with WIS. STAT. § 808.08(3) was deficient performance. For the reasons we discuss below, we reject both arguments.

A. Right to Speedy Sentencing

¶8 We review de novo whether a defendant has been denied the constitutional right to a speedy trial, although we defer to the circuit court's findings of facts unless they are clearly erroneous. *State v. Urdahl*, 2005 WI App 191, ¶10, 286 Wis. 2d 476, 704 N.W.2d 324. The right of an accused to a speedy trial is secured by the Sixth Amendment to the United States Constitution and article I, section 7 of the Wisconsin Constitution. *Id.*, ¶11. The right to a speedy trial under the Sixth Amendment encompasses the right to a speedy sentence. *State v. Allen*, 179 Wis. 2d 67, 72-73, 505 N.W.2d 801 (Ct. App. 1993).

¶9 To determine whether a defendant has been denied his or her constitutional right to a speedy trial, we apply the four-part balancing test established in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). We consider the length of delay, the reason for the delay, the defendant's assertion of the right, and the extent to which the delay prejudiced the defendant. *Id.* Wisconsin has adopted the same test. *Day v. State*, 61 Wis. 2d 236, 244-46, 212 N.W.2d 489 (1973). Wisconsin also applies the *Barker* test to post-verdict cases. *Allen*, 179 Wis. 2d at 74. However, "[t]he considerations for a delay in sentencing ... differ from those to a pretrial delay." *Id.*

The alteration of [a] defendant's status from accused and presumed innocent to guilty and awaiting sentence is a significant change which must be taken into account in the balancing process. Once guilt has been established in the first instance the balance between the interests of the individual and those of society shift proportionately.

Id. at 75, quoting *Perez v. Sullivan*, 793 F.2d 249, 254 (10th Cir. 1986). We turn to apply the *Barker* factors to the present facts, and conclude that the delay in sentencing Schmitz did not deny him the right to a speedy trial.

1. Length of Delay

¶10 The first question we must answer in considering the first factor—the length of delay—is whether the length of delay is presumptively prejudicial. *Allen*, 179 Wis. 2d at 75; *Urdahl*, 286 Wis. 2d 476, ¶12. We must answer this question in the affirmative before considering the other three *Barker* factors. *Allen*, 179 Wis. 2d at 75. In considering whether a delay is prejudicial, we examine “the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim.” *Doggett v. United States*, 505 U.S. 647, 652 (1992). In Wisconsin, a one-year delay is considered presumptively prejudicial. See *Green v. State*, 75 Wis. 2d 631, 636, 250 N.W.2d 305 (1977) (eleven and one-half month delay); also *Hatcher v. State*, 83 Wis. 2d 559, 567-68, 266 N.W.2d 320 (1978) (twelve-month delay); *Allen*, 179 Wis. 2d at 76 (ten-month delay).³ In this case, it is undisputed that there was an approximate eleven-year delay between remittitur and resentencing on the amended kidnapping

³ See also *Perez v. Sullivan*, 793 F.2d 249, 255 (10th Cir. 1986) (fifteen-month delay sufficient to provoke other factors); *Juarez-Casares v. United States*, 496 F.2d 190 (5th Cir. 1974) (thirty-one month delay presumptively prejudicial; sentence was vacated). But see *United States v. James*, 459 F.2d 443 (5th Cir. 1972) (approximate three-year delay unreasonable, but no relief granted because no actual prejudice—i.e., “meaningful loss of or injury to his rights”—shown).

charge. This is greater than one year. Therefore we presume prejudice. Accordingly, we analyze the remaining three factors.

2. Reason for Delay

¶11 In considering the second factor—the reason for the delay—we determine whether the government deliberately attempted to delay completion of the prosecution or whether the delay was merely a product of a mistake or negligence on the part of the government. See *Pollard v. United States*, 352 U.S. 354, 361 (1957); *Brady v. Superintendent, Anne Arundel County Det. Ctr.*, 443 F.2d 1307, 1311 (4th Cir. 1971); *Urdahl*, 286 Wis. 2d 476, ¶26. Where the delay is deliberately or purposely caused by the government, the delay is weighted heavily against the State. *Urdahl*, 286 Wis. 2d 476, ¶26. However, if negligence on the part of the government is the reason for the delay, the delay is weighted less heavily. *Id.* On the other hand, if the defendant is the source of the delay, it is not considered. *Id.* We now examine the reasons for the delay in resentencing Schmitz.

¶12 In an opinion dated December 10, 1992, we reversed Schmitz's conviction for Class A felony kidnapping and remanded with orders for the trial court to enter a modified judgment of conviction on the kidnapping charge to a Class B felony and resentence Schmitz accordingly. *Wisconsin v. Schmitz*, No. 91-1195-CR, unpublished slip op. at 1-2, 9-10, 12-13. The remittitur order was entered on February 18, 1993 and the file was returned to the Sauk County Circuit Court. No further action was taken until July 15, 2003, when Judge Reynolds contacted the Sauk County district attorney by letter. The judge informed the district attorney that his review of the file revealed that no action had been taken on the file following remand. The court had been alerted to the inaction on the file

by a law student intern at the Red Granite Correctional Facility. A hearing was held on August 25, 2003, where trial counsel requested a supplemental presentence investigation (PSI) report and sought a continuance of the resentencing. The court granted both requests. The resentencing hearing was scheduled without objection for December 8, 2003. Schmitz was finally sentenced on December 8, 2003, to twenty years on the amended kidnapping charge, to be served consecutive to the life sentence for the murder charge. An amended judgment of conviction was entered accordingly.

¶13 Both parties agree that the delay was not intentional on the part of the State. The record bears this out. Apparently, the case essentially “slipped through the cracks.” Our review of the record reveals that after the case was remitted to the circuit court in February 1993, Schmitz wrote a series of letters to the court that indicate some preparation for a postconviction hearing. He also filed a motion seeking permission to review the presentence investigation report prepared for the sentencing hearing following his conviction for murder and the Class A felony kidnapping charge in 1990. By a letter dated June 21, 1993, reserve Judge Wallace Brady informed Schmitz that he was on reserve status and would forward the motion papers to the Sauk County Clerk of Court. Judge Brady also informed Schmitz that the case would likely be reassigned to another judge. Shortly thereafter, the case was reassigned to another judge.

¶14 However, the application for judicial assignment form indicated that the judgment and order had been affirmed by the court of appeals and the judicial assignment order indicated that the reason for assignment was to “expedite litigation.” It appears to this court that when read together, these two documents did not communicate clearly to the newly assigned judge that additional proceedings were required. The record is also devoid of any communication from

Schmitz regarding additional proceedings needed to comply with our remand order, although it appears that Schmitz was preparing for resentencing. In letters dated February and June 1994, Schmitz wrote the court seeking copies of his indictment, the PSI, and transcripts from his 1991 postconviction motion hearing. Thus, while it appears that Schmitz was preparing for a resentencing hearing, the record contains no documents indicating such a hearing was requested or held. It is apparent that there is no evidence that the State intended to delay the resentencing or that the court acted with deliberate disregard of Schmitz's right to a speedy sentencing. To the contrary, the record supports our conclusion that the delay was caused by simple negligence on part of the government. Thus, the reasons for the delay are not weighted heavily against the State.

3. Request for a Speedy Sentencing

¶15 Schmitz did not assert his right to a speedy sentencing. As we discussed above, Schmitz communicated with the court numerous times after remittitur until June 1994. The record contains no evidence that Schmitz asserted his right to a speedy sentencing or requested resentencing at any time following remittitur. We agree with Schmitz that it is the State's duty to bring a prosecution to a final termination, not his. See *Barker*, 407 U.S. at 527; *Brady*, 443 F.2d at 1310. However, as the *Barker* Court said: "We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Barker*, 407 U.S. at 532; see also *Hatcher*, 83 Wis.2d at 568 (a "defendant's complete failure or delay in demanding a speedy trial will be weighed against him").

4. Prejudice

¶16 Turning to the issue of prejudice, we conclude Schmitz has failed to establish substantial and demonstrable prejudice caused by the delay, as required in postconviction “right to a speedy sentencing” challenges. *See Allen*, 179 Wis. 2d at 78-79. Schmitz asserts that his parole eligibility date was extended by approximately seven years due to the delay. However, he provides no record or statutory support for this assertion. Schmitz also claims prejudice as reflected in “the anxiety anyone would experience from not knowing there might be some light at the end of the tunnel sooner rather than later.” Schmitz points to nothing in the record indicating he suffered anxiety because of the delay in resentencing. Furthermore, the anxiety an accused suffers while awaiting trial is qualitatively different from the anxiety of a defendant already convicted and sentenced to a life-term sentence on a charge distinct from the charge for which the defendant awaits resentencing. *See id.* at 79.

¶17 Schmitz further speculates that the difference between serving two life sentences and serving one life sentence and a consecutive twenty-year sentence “likely affected the nature and circumstances of his incarceration.” He provides no support for this speculation, except the bare contention that a person serving consecutive life sentences would likely spend more time in a maximum security facility than a person serving a life sentence plus twenty years. He concedes, however, that he cannot demonstrate the likelihood that he would be prejudiced in such a fashion.

¶18 We recognize that, although none of the factors are necessary to establish a right to speedy trial violation, “we are reluctant to conclude there is a Sixth Amendment violation when there is no prejudice, especially in a

postconviction case.” *Allen*, 179 Wis. 2d at 77. Of the four *Barker* factors, the necessity of showing prejudice dominates the balancing test. *Id.* at 79. Once an accused is convicted, only in the rarest of circumstances will we determine that a speedy right to trial has been infringed without a clear showing of prejudice. *See Perez*, 793 F.2d at 256. This is not that case. As we have explained, the second *Barker* factor does not weigh heavily in Schmitz’s favor because the delay was not intentional, and the third factor weighs against Schmitz because he failed to invoke his right to a speedy trial during the delay. Most importantly, Schmitz has failed to demonstrate actual prejudice. Because the absence of prejudice outweighs the other factors, Schmitz’s constitutional right to a speedy trial has not been violated.

B. WISCONSIN STAT. § 808.08(3)

¶19 Schmitz contends that his trial counsel provided ineffective assistance by failing to move to dismiss the kidnapping charge under WIS. STAT. § 808.08(3) because the State failed to move for resentencing within one year of this court’s remand. We conclude that Schmitz has failed to demonstrate a reasonable probability that his trial counsel would have succeeded in moving for dismissal under § 808.08(3).

¶20 Ineffective assistance of counsel claims raise mixed questions of fact and law. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990) (citing *Strickland v. Washington*, 466 U.S. 668, 698 (1984)). In reviewing such claims, we defer to a circuit court’s findings of fact, but we review de novo questions of whether counsel’s performance was deficient and prejudicial. *See State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985).

¶21 To establish a claim of ineffective assistance of trial counsel, a defendant must prove that counsel performed deficiently and that he or she was prejudiced by counsel’s performance. *Strickland*, 466 U.S. at 687. To prove deficient performance, a defendant must show specific acts or omissions of counsel that are “outside the wide range of professionally competent assistance.” *Id.* at 690. To prove prejudice, “[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.” *Id.* at 694. Insufficient proof of one ground obviates the need to consider the other ground. See *State v. Ludwig*, 124 Wis. 2d 600, 607-08, 369 N.W.2d 722 (1985).

¶22 WISCONSIN STAT. § 808.08, entitled “Further proceedings in trial court,” provides that when the trial court receives the record and remittitur on remand,

(1) If the trial judge is ordered to take specific action, the judge shall do so as soon as possible.

(2) If a new trial is ordered, the trial court, upon receipt of the remitted record, shall place the matter on the trial calendar.

(3) If action or proceedings other than those mentioned in sub. (1) or (2) is ordered, any party may, within one year after receipt of the remitted record by the clerk of the trial court, make appropriate motion for further proceedings. If further proceedings are not so initiated, the action shall be dismissed except that an extension of the one-year period may be granted, on notice, by the trial court, if the order for extension is entered during the one-year period.

¶23 Schmitz first argues that our remand order to the trial court constitutes a “further proceeding” as that phrase is used in WIS. STAT. § 808.08(3) and as defined in *State ex rel. J.H. Findorff & Son, Inc. v. Circuit Court for*

Milwaukee County, 2000 WI 30, ¶21, 233 Wis. 2d 428, 608 N.W.2d 679. Therefore, according to Schmitz, the one-year time limit under § 808.08(3) applies to the remand order to resentence him.

¶24 Schmitz also argues, relying on *Wisconsin v. Thiel*, 2004 WI App. 140, ¶27, 275 Wis. 2d 421, 685 N.W.2d 890, that “[i]n the context of a civil proceeding WIS. STAT. § 808.08(3) places the onus on the parties to move the circuit court to conduct the further proceedings ordered on remand.” Arguing further, Schmitz asserts that, under *Brady*, 443 F.2d at 1310, the State bears the responsibility for bringing finality of a prosecution. Applying the *Brady* rule to § 808.08(3), as construed by *Thiel*, Schmitz concludes that, had his trial counsel moved for dismissal under subsection (3), the court would have granted the motion because the State failed to move the court for further proceedings. We conclude, however, that § 808.08(3), as construed and applied in *Findorff* and in *Thiel*, does not compel the result as argued by Schmitz.

¶25 In *Thiel*, we construed WIS. STAT. § 808.08(3) as saying that, if neither party moves the circuit court to conduct further proceedings ordered on remand, then the circuit court is not obligated to take any action and therefore dismissal is not required. *Thiel*, 275 Wis. 2d 421, ¶27. Applying this rule to the present facts, it is undisputed that neither party moved the trial court to hold the resentencing hearing as ordered on remand. Instead, the court learned of the lapse from an intern at the prison where Schmitz was incarcerated. Consequently, because of *Thiel*, Schmitz would not have succeeded in seeking to dismiss his kidnapping charge even had his trial counsel moved the court to do so.

¶26 Setting *Thiel* aside for the moment, however, we question whether WIS. STAT. § 808.08 applies in criminal cases and we doubt if the legislature

intended that § 808.08(3) be applied to vacate and dismiss criminal convictions because of a violation of its terms. We agree with the State that speedy trial principles generally govern situations involving delays in trial or sentencing, as we see in the first issue on this appeal. Schmitz fails to draw our attention to any language in the statute or any case law indicating the legislature intended to replace the normal constitutional rules and analyses governing delays in trial and sentencing with WIS. STAT. § 808.08(3). That is especially true, for example, where a delay of just one year and a day results in a reversal and dismissal of a criminal conviction under Schmitz’s reading of subsection (3), yet the facts would not support reversal under speedy trial principles.

¶27 In addition, we have reservations about the interpretations of WIS. STAT. § 808.08 found in *Findorff* and *Thiel*. For example, it is not apparent to us why *Thiel* applies subsection (3), rather than subsection (1). It would seem that an order remanding a case to the circuit court for resentencing is an order requiring a “specific action” under subsection (1). The order directs the circuit court to vacate the existing sentence, hold a new sentencing hearing, and render a new sentence. It is true that to render a new sentence the circuit court must exercise discretion, but the circuit court has no discretion not to impose a new sentence.

¶28 Regardless of our concerns, we are bound by *Findorff* and *Thiel*. Therefore, we apply *Thiel* and conclude that, because neither party moved the trial court to hold a resentencing hearing after remittitur, Schmitz’s trial counsel would not have succeeded had he moved for dismissal of the kidnapping charge under WIS. STAT. § 808.08(3).

CONCLUSION

¶29 Based on the foregoing reasons, we conclude that Schmitz's right to a speedy trial was not violated. We also conclude that Schmitz has not shown that he received ineffective assistance of trial counsel. We therefore affirm the judgment and order of the trial court.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

