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EGMR Nr. 62116/00 - Zulässigkeitsentscheidung vom 31. März 2005 (Mattick v. Deutschland)

Recht auf ein faires Verfahren (ausreichende Zeit und Gelegenheit zur Vorbereitung der Verteidigung: Verfahrensaussetzung; Beachtung der Arbeitslast des Rechtsanwaltes und erwartbare Umverteilung der Arbeitsbelastung; Vorbereitung bei einer möglichen Sicherungsverwahrung).

Art. 6 Abs. 3 lit. b EMRK; Art. 5 EMRK; Art. 2 Abs. 1 GG; Art. 20 Abs. 3 GG; § 265 StPO; § 66 StGB

Leitsätze des Bearbeiters

1. Die gemäß Art. 6 Abs. 3 lit. b EMRK erforderliche Zeit zur Vorbereitung kann nicht abstrakt bestimmt werden, sondern ist allein relativ auf die Umstände des konkreten Falles zu beziehen.

2. Wenn die Dauer der Vorbereitungszeit zu bestimmen ist, ist nicht nur die Komplexität des Falles, sondern auch die übliche Arbeitsbelastung eines Rechtsanwaltes einzubeziehen, von dem gewiss nicht erwartet werden kann, dass er sein gesamtes Arbeitsprogramm so umstellt, dass er seine gesamte Zeit nur dem einen vorliegenden Fall widmet. Es ist jedoch nicht unvernünftig, zu erwarten, dass ein verteidigender Rechtsanwalt einem besondere Dringlichkeit aufweisenden Fall im Rahmen seiner Arbeitsorganisation eine vermehrte Bedeutung zuweist.

3. Droht dem Angeklagten die Sicherungsverwahrung nach deutschem Recht, hat der Verteidiger nicht nur die aktuelle Anklage zu bewältigen, sondern auch die früheren Verurteilungen und ein Sachverständigengutachten zu bearbeiten. Hierfür muss ein Verteidiger größtmögliche Sorgfalt aufwenden und eine dem angemessene Zeit zur Verfügung haben.

THE FACTS

... 1

A. The circumstances of the case 2

The facts of the case, as submitted by the parties, may be summarised as follows. 3

1. The preliminary investigations 4

On 23 November 1998 the applicant was placed in interim police custody (*vorläufig festgenommen*) on the suspicion of attempted homicide. 5

On 24 November 1998 he was placed in pre-trial detention based on an arrest warrant issued by the Deggendorf District Court on the same day. 6

On 24 March 1999, upon the Public Prosecutor's request, the physician W gave his first psychiatric expert opinion on the applicant, stating that the requirements of section 21 of the German Criminal Code (diminished criminal liability - *verminderte Schuldfähigkeit*) were met. However, he further stated that the requirements of section 64 of the German Criminal Code (placement in an alcohol detoxification clinic - *Unterbringung in einer Entziehungsanstalt*) were not fulfilled. 7

On 20 April 1999 the Deggendorf Public Prosecutor's office issued the bill of indictment indicating that due to the previous convictions the applicant met the requirements for the placement in compulsory confinement (*Sicherungsverwahrung*) according to section 66 of the German Criminal Code (see relevant domestic law below). 8

On 19 May 1999 the applicant's defence counsel requested access to the applicant's present and previous case files in 9

order to prepare the applicant's defence. He elaborated that with regard to the applicant's possible placement in compulsory confinement it was necessary to have access to the case files relating to the applicant's previous convictions. Furthermore, he requested an expert opinion on the question whether the requirements of section 66 of the German Criminal Code for compulsory confinement were met by the applicant.

2. The proceedings before the Deggendorf Regional Court 10

On 17 May 1999 the Deggendorf Regional Court opened the main proceedings (*Eröffnung des Hauptverfahrens*). 11

On 26 May 1999 the Deggendorf Regional Court granted the defence counsel access to the case file of the present case as well as the case files concerning two previous convictions. The defence counsel received those files on 2 June 1999. 12

On 2 June 1999 the Deggendorf Regional Court set the date for the hearing for 1 July 1999 and summoned witnesses and W to appear on that date. 13

On 7 June 1999 the Public Prosecutor's Office asked for an expert opinion on the question whether the requirements of section 66 of the German Criminal Code were met. 14

On 15 June 1999 the Regional Court requested the case files regarding the applicant's previous 20 convictions. The court only received eight additional files, five of which contained only the judgments (*Strafurteile*) or penal orders (*Strafbefehle*), but not any further documents. The other case files could not be obtained by the court. On the same day the Public Prosecutor's Office requested a supplementary expert opinion on the question whether the requirements of placement in compulsory confinement were met. 15

On 21 June 1999 W provided the Public Prosecutor's Office with his expert opinion. On 28 June 1999 the defence counsel received a copy. 16

It comprised only seven pages, two of which were dedicated to the expert's conclusion that the requirements of section 66 of the German Criminal Code were met. On the same day, 28 June 1999, the applicant's defence counsel also received the case files of the eight previous convictions. 17

a. The first hearing on 1 July 1999 18

On 1 July 1999 the defence counsel requested the suspension of the trial (Aussetzung des Verfahrens) invoking a violation of Article 6 § 3b of the Convention. He argued that he had not had enough time to prepare the applicant's defence. The court rejected his request stating that the defence counsel had known since the communication of the bill of indictment that the issue of compulsory confinement would be subject of the trial. Furthermore, it elaborated that there had been no change of circumstances (Sachlage) which would allow a suspension according to section 265 § 4 of the German Criminal Procedure Code. It also pointed out that the expert opinion had been ordered at the applicant's request. The court further noted that the expert's written submissions were not at all as important as the expert's oral remarks during the hearing. Moreover, the applicant's defence counsel requested the taking of further evidence. 19

b. The second hearing on 8 July 1999 20

On 8 July 1999 the trial was resumed. The expert W delivered his expert opinion and was questioned by the applicant's defence counsel. Upon the defence counsel's motion the court ordered a supplementary test-psychological expert opinion to be obtained by the second expert T. 21

c. The third hearing on 13 July 1999 22

On 13 July 1999 the court summoned the two experts to render their opinions on 21 July 1999. On 14 July 1999 T conducted a test-psychological evaluation of the applicant and provided his written opinion on 15 July 1999. 23

d. The fourth and last hearing on 21 July 1999 24

During the last hearing on 21 July 1999 T orally presented his test-psychological evaluation. Then W made supplementary statements regarding his own opinion and T's evaluation. The applicant's defence counsel then requested an additional expert opinion. His motion comprised five pages and included statements on W's opinion. 25

However, the court rejected the request as unnecessary as it considered the expert's opinion convincing.

The court then closed the taking of evidence and later pronounced its judgment. It convicted the applicant of attempted homicide and having caused grievous bodily harm by one and the same act (versuchter Totschlag in Tateinheit mit gefährlicher Körperverletzung) and sentenced him to 5 years and six months' imprisonment. Moreover, the applicant was placed in compulsory confinement. The court stated that the requirements of section 66 of the German Criminal Code were met, taking into consideration the present and previous convictions. It concluded that the applicant had to be considered dangerous and that the placement in compulsory confinement was proportionate. 26

3. The decision of the Federal Court of Justice 27

On 7 December 1999 the Federal Court of Justice rejected the applicant's appeal on points of law. 28

4. The decision of the Federal Constitutional Court 29

On 14 February 2000 the Federal Constitutional Court refused to entertain the applicant's complaint. 30

B. Relevant domestic law 31

The law against dangerous habitual criminals (*Gesetz gegen gefährliche Gewohnheitsverbrecher*), which entered into force on 24 November 1933, allowed to subject perpetrators to certain measures of reform and prevention (*Maßregeln der Besserung und der Sicherung*). These measures are not supposed to be punishment, but rather an attempt to prevent future offences by reforming the perpetrators and thus preserving the public order. 32

Those measures are governed by sections 61 and following of the German Criminal Code. They include the placement in a psychiatric hospital, the placement in an institution for a detoxification treatment (*Entziehungsanstalt*), compulsory confinement, supervision of conduct (*Führungsaufsicht*), the revocation of driving licences and the prohibition to exercise a certain profession. According to section 62 the measure has to be proportionate to the offence committed and to the danger presented by the perpetrator. Section 66 § 2 states that a perpetrator can be placed in compulsory confinement if he committed three premeditated offences for which he incurred, respectively, imprisonment for one year or more and if he is sentenced to a prison sentence of at least three years for one or more of these acts and poses a threat to the public order. 33

Section 66 reads as follows: 34

"(1) If a perpetrator is convicted of an intentional offence and is sentenced to at least two years' imprisonment, the court places the perpetrator in compulsory confinement in addition to the punishment, if 35

1. the perpetrator was already convicted of intentional offences and hence sentenced twice to at least one year imprisonment before committing the new act, 36

2. the perpetrator serves a prison sentence of at least two years for those previous convictions or was detained during a measure of reform or prevention and 37

3. the assessment of the perpetrator and his offences shows that he poses a threat to the general public due to his inclination to considerable offences, in particular to those which inflict severe psychological and physical damage on the victims or which cause grave economic damage. 38

(2) If a perpetrator committed three intentional offences, each of which is punishable by at least one year's imprisonment and if he is sentenced to at least three years' imprisonment for one or more of these offences, the court may, under the provision indicated in subsection 1 no 3, place the applicant in compulsory confinement in addition to the punishment even without a previous conviction or deprivation of liberty (subsection 1 nos. 1 and 2). ..." 39

Section 67c § 1 reads as follows: 40

"If a prison sentence is executed before the placement in compulsory confinement, the court examines, towards the end of the execution of the sentence, whether the aim of the measure still requires the placement in compulsory confinement." 41

The former section 67d limited the length of compulsory confinement to ten years. It was modified by the Sixth Act to reform the German Criminal Code (Sechstes Gesetz zur Reform des Strafrechts) which entered into force on 26 January 1998, and the new Act for the Abatement of Sexual Offences and Other Dangerous Offences (Gesetz zur Bekämpfung von Sexualdelikten und anderen gefährlichen Straftaten). 42

The new section 67d § 3 reads as follows: 43

"After ten years in compulsory confinement have been completed, the court declares the measure terminated, as long as there is no danger that the detainee will commit, due to his inclination, further grave offences which would risk inflicting severe psychological and physical damage on the victims. If the measure is considered completed, the detainee will be placed under supervision of conduct." 44

Section 1a of the Introductory Act to the German Criminal Code states that the new Article 67d applies without any temporal limitations, thus retrospectively. Section 67e states that the court can examine *ex officio* at any given time whether the execution of the compulsory confinement could be suspended on probation, but it is required to do so at least every two years. 45

COMPLAINT

The applicant complained under Article 6 § 3 (b) of the Convention that his defence counsel had not had enough time to prepare his defence. The latter received the psychological expert opinion and eight of the case files only on 28 June 1999, whereas the first hearing began on 1 July 1999. 46

THE LAW

The applicant complained that the lack of sufficient time for the preparation of his defence amounted to a breach of Article 6 § 3 (b) of the Convention, which provides: 47

"3. Everyone charged with a criminal offence has the following minimum rights: 48

... 49

(b) to have adequate time and facilities for the preparation of his defence;" 50

The Government contested this view. Firstly, the Government drew the Court's attention to the fact that the bill of indictment had already concluded that the requirements for compulsory confinement were met. Thus, when receiving the case file on 2 June 1999, the applicant already knew that compulsory confinement would be the subject of the trial. The Government further stated that the written expert opinion of 21 June 1999 merely served as a preparation for the hearing and that only the oral expert opinion was decisive for the court. The Government also argued that the written opinion itself was short and was only based on the content of the case-file and the initial examination of 24 March 1999. It pointed out that the trial lasted until 21 July and that the applicant's legal counsel had in fact made use of that time. According to the Government, this was evidenced by the defence counsel's two motions of 8 and 21 July 1999 in which he had requested an additional expert opinion. The Government stated that the second motion in particular was comprehensively substantiated and thus showed that the legal counsel had had sufficient time to prepare the applicant's defence. 51

With regard to the case-files the Government argued that the applicant's defence counsel had received the case-file of the present case and two case files of previous convictions on 2 June 1999. It also stated that five of the remaining eight case-files which the legal counsel had received on 28 June 1999 contained only the judgments and no further documents. The Government further explained that the previous convictions only became relevant with regard to the oral experts' opinions which were given on 8 and 21 July 1999 respectively. It further stated that the hearing was interrupted several times and lasted for over three weeks, with four days of hearings, hence providing the defence counsel with additional time. 52

The applicant replied that the receipt of the written expert opinion two working days before the commencement of the trial was not enough to have the expert opinion checked by an expert of his defence counsel's choice. In his opinion this would have been called for, as the expert had been chosen by the Public Prosecutor's Office. Even if this had not been possible, his defence counsel would have needed at least sufficient time to familiarise himself with its content. In this respect he pointed out that his defence counsel did not have the sufficient medical expert knowledge to deal with the expert opinion himself and stressed that compulsory confinement was imposed by German courts very rarely. 53

Moreover, the applicant held the opinion that the fact that his defence counsel actually had made use of the time between the hearings to prepare the defence was irrelevant, as Article 6 § 3 (b) dealt with the preparation of the hearing before it commenced. Thus, the time between the different hearings could not be interpreted as serving for the preparation of the hearing itself. The applicant stated that his defence counsel had actually filed the motions for additional expert opinions in order to delay the proceedings to gain additional time. He pointed out that the Regional Court had originally scheduled only 1 July 1999 for the trial and that only due to his defence counsel's additional motions the trial lasted until 21 July 1999. However, this supplementary time had not been sufficient, according to the applicant. 54

The Court recalls that Article 6 § 3(b) of the Convention entails two elements of a proper defence, i. e. the question of facilities and that of time. The question of time cannot be addressed in abstracto, but only in relation to the circumstances of the concrete case (see Mortensen v. Denmark, no. 24867/94, Commission decision of 15 May 1996; Hayward v. Sweden, no. 106/88, Commission decision of 6 December 1991). The Court further recalls that when determining the length of the preparatory time needed, the Court takes into account not only the complexity of the case, but also the usual workload of a legal counsel who certainly cannot be expected to change his whole programme in order to devote all his time to one case. However, it is not unreasonable to require a defence lawyer to arrange for at least some shift in the emphasis of his work if this is necessary in view of the special urgency of a particular case (mutatis mutandis see X and Y v. Austria, no. 7909/74, Commission decision of 12 October 1978, Decisions and Reports (DR) 15, p. 163). 55

The Court acknowledges that when a defendant faces compulsory confinement, a defence lawyer not only has to deal with the current charges, but also has to look into previous convictions and a psychological expert opinion. Hence a defence counsel has to exercise utmost diligence and needs an appropriate amount of time. 56

The Court observes that in the present case the defence counsel received the case-file of the proceedings pending before the Deggendorf Regional Court on 2 June 1999. On the same day he also received the case-files regarding two previous convictions. Thus, he had about one month at his disposal before the commencement of the trial. This period was sufficient for the defence counsel to familiarise himself with those case-files. 57

As regards the receipt of W's expert opinion on 28 June 1999, three days before the commencement of the trial, the Court observes that that opinion served as a preparation for questioning the expert in court on 8 July 1999. Hence the defence counsel had an additional week to prepare the expert's questioning. Furthermore, both experts T and W were heard again on 21 July 1999. Thus, the applicant had up to two additional weeks to prepare the experts' final questioning on 21 July 1999. 58

As regards the receipt of the remaining case files on 28 June 1999, thus three days before the commencement of the trial, the Court notes that the issue of compulsory confinement, for which the number and nature of previous convictions were crucial, was discussed on 8 and 21 July 1999. Therefore, the applicant's defence counsel had additional time to study those case files. In this respect the Court points out that the trial lasted until 21 July 1999, because the defence counsel had delayed it in order to gain time. Contrary to the applicant's opinion, the Court finds that the time between the hearings counts as preparatory time. Article 6 § 3(b) of the Convention does not require that the preparation of a trial which lasts over a certain period of time is completed before the first hearing. In fact, it is the amount of time actually available which counts towards the preparatory time. It could not be otherwise since the course of trials cannot be fully charted in advance and may reveal elements which have not hitherto come to light and which require further preparation from the parties. Taking into account the defence counsel's general duty to focus on an urgent case, the Court concludes that the time between 28 June and 1 July 1999 and the supplementary time until 21 July 1999 were amply sufficient to study the written expert opinion and the remaining case-files. Thus, the Court finds that there is no appearance of a violation of Article 6 § 3(b) of the Convention. Therefore, the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be declared inadmissible in accordance with Article 35 § 4 of the Convention. 59

For these reasons, the Court unanimously 60

Declares the application inadmissible. 61