IN THE UTAH COURT OF APPEALS

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Orem City, Plaintiff and Appellee, v. Richard Lloyd Hansen, Defendant and Appellant.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20070268-CA F I L E D (August 28, 2008) 2008 UT App 317

Fourth District, Orem Department, 065214385
The Honorable John C. Backlund

Attorneys: Laura H. Cabanilla, Provo, for Appellant
Andrew F. Peterson and Robert J. Church, Orem, for Appellee

Before Judges Thorne, Billings, and Orme.

THORNE, Associate Presiding Judge:

Orem City (the City) charged Richard Lloyd Hansen with multiple crimes after Hansen was discovered asleep in his car with an unloaded pistol in his pocket. At a bench trial, Hansen was convicted of five misdemeanor criminal offenses, including carrying a concealed dangerous weapon, possession of a dangerous weapon while intoxicated, and driving under the influence of alcohol. Hansen appeals and we affirm.

Hansen first argues that the district court erred when it granted the City's motion to continue his trial without giving him an opportunity to respond to the motion. Hansen was arraigned on December 11, 2006, and remained in custody through trial. At a pretrial conference conducted on January 3, 2007, trial was set for January 24. On January 16, the City filed an ex parte motion for continuance of the trial because the City's primary witness would be unavailable on January 24. The next day, without giving Hansen notice or an opportunity to respond, the district court granted the City's motion and continued the trial until March 7.

While notice and an opportunity to be heard are the hallmarks of due process and should be afforded in most

instances, not every order entered upon an ex parte motion violates a defendant's rights. See In re P.F.B., 2008 UT App 271, ¶¶ 20-21, 608 Utah Adv. Rep. 31 (addressing an argument that the juvenile court granted a motion without adequate notice or opportunity to respond). Here, it is undisputed that the grounds for the City's motion constituted good cause for a continuance. See State v. Trafny, 799 P.2d 704, 707 (Utah 1990) ("[U]navailability of witnesses is a valid reason for the State to ask for a continuance."). Further, we note that Hansen filed no timely objection to the district court's order but instead waited until the first day of trial--when there could be no effective remedy--to raise the issue. It is certainly preferable for parties to be given notice and an opportunity to respond to any motion, but under these circumstances, where valid grounds for a continuance existed and no timely objection was lodged after the continuance was granted, we see no reversible error in the district court's order granting the City its requested continuance. Cf. In re P.F.B., 2008 UT App 271, ¶ 21 ("Mother raised no objection below to the circumstances surrounding the entry of the order[, nor] does she provide legal authority to challenge the substance of the order . . . .").

Hansen next argues that the continuance of his trial violated his right to a speedy trial because he had requested a speedy trial and remained in custody until trial. Hansen was in custody a total of eighty-nine days from his December 9, 2006 arrest until his March 7, 2007 trial. Hansen, however, provides no authority to suggest that such a short period of time constitutes a speedy trial violation or is even prejudicial enough to trigger a formal speedy trial analysis. See Trafny, 799 P.2d at 706-07 (adopting a four-prong test to evaluate arguments alleging a speedy trial violation and stating that "[t]he length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance'" (quoting Barker v. Wingo, 407 U.S. 514, 530 (1972))).[1] Because Hansen has failed to establish

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[1]The other three factors identified in State v. Trafny, 799 P.2d 704 (Utah 1990), are the reason for the delay, the defendant's assertion of his right to a speedy trial, and prejudice to the defendant. See id. at 707. Hansen also points out that the nature of the charges against a defendant can bear on how long trial may permissibly be delayed. See Barker v. Wingo, 407 U.S. 514, 531 (1972) ("[T]he delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge."). Although we do not address these other factors, we note that Hansen was charged with (continued...)

that the circumstances of this case constitute a violation of his right to a speedy trial, we decline to disturb his convictions on this ground.

Hansen next argues that the district court erred when it admitted breath test results showing Hansen's blood alcohol level to be .325. The City concedes, for purposes of this appeal, that the test results should not have been allowed into evidence because of insufficient foundation for their admission. However, the City urges us to consider the admission of the results under a harmless error analysis. See generally State v. Nichols, 2003 UT App 287, ¶ 48, 76 P.3d 1173. "'If the error was harmless, that is, if the error was sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the case, then a reversal is not in order.'" Id. (quoting Armed Forces Ins. Exch. v. Harrison, 2003 UT 14, ¶ 22, 70 P.3d 35).

Here, in light of the overwhelming evidence of Hansen's intoxication, we agree with the City's argument that no harm resulted from the district court's consideration of the breath test results. Evidence of intoxication in this case included, but was not limited to: Hansen's discovery, asleep, in an illegally parked car, at 4:30 in the afternoon; Hansen's odor of alcohol, grogginess, stumbling, and poor balance; the presence of peppermint schnapps in a thermos cup in Hansen's vehicle's center console; the presence of two peppermint schnapps bottles, one empty and one partially-empty, in Hansen's vehicle; Hansen's failure or inability to complete field sobriety tests; and Hansen's attempts to manipulate the breath test results.[2] Evaluating the evidence as a whole, we cannot say that there is a reasonable likelihood that Hansen would have obtained a better result had the breath test results not been admitted. Accordingly, any error in admitting the results was harmless.[3]

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[1](...continued)
multiple offenses, including two weapons offenses involving a firearm, and that the sole continuance was clearly requested for good cause.

[2]Although it is troubling to us that the district court expressly relied on the breath test as conclusive evidence that Hansen's version of events was incorrect, we believe that the other evidence in the case is equally inconsistent with Hansen's testimony.

[3]Breath tests, like lie detectors, carry the imprimatur of scientifically-established fact and can therefore be extremely prejudicial. We caution that in cases where the evidence of intoxication is not overwhelming it may be difficult or
(continued...)

Finally, Hansen argues that his weapons convictions must be reversed because it is uncontested that the pistol found on his person was unloaded and did not contain a magazine. Hansen argues that, without the magazine, the pistol was incapable of firing and was thus neither a "firearm," see Utah Code Ann. § 76-10-501(9)(a) (2003) ("'Firearm' means a pistol . . . ."), nor a "dangerous weapon," see id. § 76-10-501(5)(a) ("'Dangerous weapon' means any item that in the manner of its use or intended use is capable of causing death or serious bodily injury."). However, even assuming the possibility of legal merit to such an argument, Hansen presented no testimony at trial that pistols in general, or his pistol in particular, are incapable of firing a round contained in the chamber merely because the magazine is not present. Further, Utah law clearly accounts for the possibility that an unloaded firearm may constitute both a firearm and a dangerous weapon. See id. § 76-10-504(1)(b) ("[A] person . . . who carries a concealed dangerous weapon which is a firearm and that contains no ammunition is guilty of a class B misdemeanor . . . ." (emphasis added)). Finally, we note that the district court considered that police found a loaded magazine for Hansen's pistol in an unlocked briefcase that was readily accessible to Hansen in the back seat of his vehicle. We find Hansen's arguments regarding the firing status of the pistol to be unpersuasive.

For these reasons, Hansen has not established grounds for reversal of his convictions below. Accordingly, we affirm the judgment of the district court.

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William A. Thorne Jr.,
Associate Presiding Judge

WE CONCUR:

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Judith M. Billings, Judge

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Gregory K. Orme, Judge

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[3](...continued)
impossible to demonstrate harmless error from the wrongful admission of breath test results, particularly if the matter is tried to a jury rather than to the bench.