STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUGLAS CARL HAGELGANS,

Defendant-Appellant.

UNPUBLISHED
September 8, 1998

No. 202158
St. Joseph Circuit Court
LC No. 95-080621 FH

Before: Sawyer, P.J., and Kelly and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of operating a vehicle while under the influence of intoxicating liquor (OUIL), MCL 257.625(1); MSA 9.2325(1), and sentenced to 365 days' imprisonment. Defendant appeals his conviction as of right. We affirm.

Defendant was arrested after Brian LaValle, a St. Joseph County deputy, pulled over defendant in his vehicle and performed several sobriety tests. Defendant consented to a blood test that revealed a blood alcohol content of 0.15 percent. Defendant claims that he did not drink any alcoholic beverages on the day he was arrested, but had been using cough syrup and mouthwash to treat a cold. Defendant contends that the alcohol in the mouthwash resulted in the unlawful blood alcohol content.

I

Defendant first claims that he was denied his right to a speedy trial. In *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997), this Court noted that the following factors are considered in determining whether a defendant has been denied his right to a speedy trial:

> (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) any prejudice to the defendant.

Defendant was arrested on May 30, 1995, and his trial began on December 11, 1996. Defendant asserted his right to a speedy trial on December 3, 1996.

Regarding the first factor, the length of the delay, the prosecutor has conceded that the time between defendant's arrest and the motion to dismiss on the basis that he was denied his right to a speedy trial was just over eighteen months. A delay of more than eighteen months is presumed to be prejudicial; the prosecution bears the burden of proving lack of prejudice to the defendant. *Id*.

The second factor is the reason for the delay. The parties agree that the reason for the delay was "docket congestion." Although delays inherent in the court system, such as docket congestion, are technically attributable to the prosecution, they are given a neutral tint and are assigned only minimal weight in determining whether a defendant was denied a speedy trial. *Id*. at 460. Plaintiff argues that at least a portion of the delay was because "the parties both wanted a delay to accommodate ongoing plea negotiations." However, the lower court file does not reveal any orders for adjournment of trial.

The third factor is defendant's assertion of his right to a speedy trial. Defendant asserted his right to a speedy trial on December 3, 1996, more than eighteen months after defendant's arraignment. Citing *People v Lowenstein*, 118 Mich App 475, 488-489; 325 NW2d 462 (1982), defendant asserts that he effectively asserted his right to a speedy trial by filing several motions to dismiss before eighteen months had passed after his arraignment. Although we have held that a defendant may assert his right to a speedy trial in a motion to dismiss, *id*. at 489, and defendant filed several motions to dismiss, defendant never mentioned the right to a speedy trial in those motions. Further, when defendant finally asserted his right to a speedy trial on December 3, 1996, those rights had already been violated. The assertion of the right to a speedy trial is not properly made in a motion to dismiss, where the motion "contended that the defendant's rights *already* had been violated." *People v Wimbley*, 108 Mich App 527, 533; 310 NW2d 449 (1981). Therefore, defendant's motions to dismiss cannot be viewed as an assertion of defendant's right to a speedy trial, and defendant has not satisfied this factor.

Finally, the fourth factor requires that defendant be prejudiced by the delay. Defendant claims that the delay caused witnesses' memories to fade. Specifically, defendant contends that Ann Fisher, the nurse who drew defendant's blood at the hospital the night of his arrest, could not remember how defendant had behaved that night. However, the passenger in defendant's car on the night of defendant's arrest testified that defendant appeared sober. LaValle testified that defendant had been cooperative. Therefore, defendant was not prejudiced by Fisher's lack of memory.

Defendant also asserts that he was prejudiced because LaValle could not remember certain details regarding the administration of the field sobriety tests. Such a general allegation of memory loss is insufficient to establish that defendant was denied his right to a speedy trial. *Gilmore*, *supra* at 462. However, we have also held that "where the case against the defendant is complex or involves numerous defendants, more delay is tolerated. . . . [and] less delay is tolerated where the case is simple." *Id*. This case is quite simple in that it involves only defendant and did not involve complex legal or factual issues. The prosecution and defendant each presented only three witnesses and all witnesses were presented in one day. Although defendant may have been prejudiced to some extent by the eighteen-month delay in bringing his case to trial, his general allegation of memory loss by witnesses does not support the finding that defendant's right to a speedy trial was abridged. The trial court did not err.

II

Next, defendant contends that the trial court erred in binding defendant over to circuit court because no additional evidence was presented at defendant's second preliminary examination as required by MCR 6.110(F).

MCR 6.110(F) provides as follows:

> If, after considering the evidence, the court determines that probable cause does not exist to believe either that an offense has been committed or that the defendant committed it, the court must discharge the defendant without prejudice to the prosecutor initiating a subsequent prosecution for the same offense. Except as provided in MCR 8.111(C), the subsequent preliminary examination must be held before the same judicial officer and the prosecutor must present additional evidence to support the charge.

At the first preliminary examination, the prosecutor introduced through LaValle the laboratory report showing that defendant had a blood alcohol content of 0.15 percent. At the second preliminary examination, Geoffrey French, a laboratory scientist, testified that he had analyzed a sample of defendant's blood and described the procedure by which that sample was tested. Defendant then cross-examined French.

"When the same evidence is relied on in a subsequent examination, appeal is the proper remedy. MCR 6.110(F) prevents 'judge shopping' by requiring that a subsequent examination be before the same magistrate, if available, and that additional evidence be presented." *People v Robbins*, 223 Mich App 355, 362; 566 NW2d 49 (1997). In *Robbins*, the prosecutor sought to offer testimony that, although it had been available at the time of the first examination, additional evidence had not been offered. We held that the prosecutor's tactics did not involve harassing the defendant or engaging in judge shopping, and that the reinstatement of charges against the defendant was permissible. *Id*. at 362-363.

In this case, the prosecutor presented additional testimony regarding the analysis of defendant's blood sample. However, the record makes clear that the second hearing was held in order to give defendant an opportunity to cross-examine French. The prosecutor acknowledged at the first hearing that he had simply overlooked defendant's request to examine French, and therefore, had neglected to arrange for French to be present. There is no evidence that the prosecutor acted deliberately or in an attempt to harass defendant. Further, Judge William L. McManus presided over both hearings, as required by the court rule. The trial court determined after the first hearing that defendant should have the opportunity to question French, and therefore scheduled a second hearing. Because additional evidence was presented at the second hearing, and the purpose of the second hearing was not to judge shop or harass defendant, defendant was not denied his right to due process and MCR 6.110(F) was not violated.

III

Defendant argues that the prosecutor was required to appeal the trial court's dismissal of the charges following the first preliminary examination rather than refile the charges against defendant. However, that remedy is only required where the same evidence is relied on in the subsequent examination. *Robbins, supra* at 362. As discussed in Issue II, the prosecutor presented additional evidence at the second preliminary examination in satisfaction of MCR 6.110(F).

Additionally, the record reveals that the charges against defendant were dismissed due to the prosecutor's failure to secure the attendance of French at the first preliminary examination as requested by defendant pursuant to MCL 600.2167(4); MSA 27A.2167(4), not because of a lack of evidence. MCR 6.110(F) contemplates the dismissal of charges where "the court determines that probable cause does not exist . . . ." Therefore, the prosecutor was not required to appeal the dismissal of the charges against defendant after the first preliminary examination, but properly refiled the charges.

IV

Defendant contends that the failure of both the prosecutor and the trial court to submit a written order denying defendant's motion to dismiss deprived defendant of his right to seek leave to appeal that decision.

MCR 2.602(A) states as follows:

> Except as provided in this rule and in MCR 2.603, all judgments and orders must be in writing, signed by the court and dated with the date they are signed. The date of signing an order or judgment is the date of entry.

A hearing was held on February 20, 1996, regarding defendant's motion to dismiss on the ground that MCR 6.110(F) had been violated as discussed above. Judge William C. Buhl denied defendant's motion. Judge Buhl then stated, "I trust the prosecutor will present an order to that effect." The prosecutor agreed to prepare the order.

We have held that a trial court's oral denial of a motion has the same weight and effect as a written order. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). In this case, the trial court stated clearly that it was denying defendant's motion for dismissal and gave reasons for the denial. The trial court then asked the prosecutor to present an order denying defendant's motion to dismiss. Judge Buhl's denial of defendant's motion was unequivocal. Therefore, defendant was not denied his right to seek leave to appeal the trial court's ruling, merely because the ruling was not reduced to writing. *People v Vincent*, 455 Mich 110, 126-127; 565 NW2d 629 (1997). Further, it is the joint obligation of the parties to prepare a written order to be signed by the judge. *Griffin v Michigan Civil Service Comm*, 134 Mich App 413, 417 n 1; 351 NW2d 310 (1984). Defendant could have submitted a proposed order or moved for entry of the order in order to obtain the written order. In any event, we have reviewed the issue so defendant was not denied his right to appeal it.

V

Defendant argues that because his consent to a blood test was given after he was arrested, but before he had received the *Miranda*[1] warnings, his consent was invalid and therefore the results of the blood test should not have been admitted at trial.

Miranda warnings are not required unless the accused is subject to a custodial interrogation. *People v Hill*, 429 Mich 382, 384; 415 NW2d 193 (1987). In this case, LaValle testified that defendant was arrested and transported immediately to the hospital for the blood draw. Therefore, it appears that defendant was in custody at the time he consented to the blood draw as contemplated by *Miranda*. *People v Mayes (After Remand)*, 202 Mich App 181, 190; 508 NW2d 161 (1993). However, police conduct constitutes an interrogation triggering *Miranda* only when the conduct constitutes express questioning or a practice which the police knew or reasonably should have known was likely to invoke an incriminating response. *People v Anderson*, 209 Mich App 527, 532-533; 531 NW2d 780 (1995). In *People v Burhans*, 166 Mich App 758, 763-764; 421 NW2d 285 (1988), this Court held that the police are not required to advise a suspect of the *Miranda* rights before requesting the suspect to perform sobriety tests. This Court reasoned that physical sobriety tests do not constitute interrogation and, therefore, a suspect does not have the right to counsel during those tests. *Id*.

This logic applies equally to the instant case. It cannot be said that a request by the police for a suspect's consent to draw blood constitutes "express questioning or a practice which the police knew or reasonably should have known was likely to invoke an incriminating response." Like the sobriety tests, neither does the blood draw itself constitute interrogation. Therefore, defendant was not subject to interrogation and the police were not required to advise defendant of the *Miranda* warnings before requesting his consent for a blood test.

VI

Finally, defendant argues that the statements made by the police in advising defendant of his rights concerning the blood test indicated that defendant was not presumed innocent but that defendant's guilt or innocence would be determined later. Defendant contends that the police read the following statement to defendant before asking him to consent to a blood test:

> After taking my chemical test, you have a right to demand [your own independent test].
>
> The results of both [your independent and the state's] tests shall be admissible in a judicial proceeding, and will be considered with other competent evidence in determining your innocence or guilt.

Defendant argues that the phrase "in determining your innocence or guilt" implies that defendant's innocence was to be determined, not presumed, and that this misstatement of the law made defendant's consent invalid. The record does not reveal what statements were made to defendant about his rights concerning the chemical test. However, the prosecutor does not dispute defendant's assertion and,

also, the language quoted by defendant mirrors the language found in MCL 257.625a(6)(b)(ii); MSA 9.2325(1)(6)(b)(ii), which addresses chemical tests and analysis of a person's blood.

The police clearly did not misstate the law to defendant because the language used mirrors the language found in the statute. Further, there is nothing in the language of the statute or the statement made to defendant by the police to indicate that the burden is being shifted to defendant to prove his innocence. The language appropriately indicates that the results of the blood test can be used either to inculpate or exculpate defendant. Nothing in the language of the statute supports defendant's argument that such language would "trick" defendant into consenting to the blood test. Defendant consented to the blood test and the trial court properly admitted the test results at trial.

Affirmed.

/s/ David H. Sawyer
/s/ Michael J. Kelly
/s/ Michael R. Smolenski

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).