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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1667**

State of Minnesota,
Respondent,

vs.

Hisham Ismaeil Rawi,
Appellant.

**Filed August 20, 2018
Affirmed
Connolly, Judge**

Hennepin County District Court
File No. 27-CR-17-6118

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, J. Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Johnson, Judge; and
Kalitowski, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges his conviction on the ground that he was denied a speedy trial because 87 days passed between his speedy-trial demand and the start of his trial. Because the delay was only 27 days beyond the 60 days allowed by Minn. R. Crim. P. 11.09(b) and because much of the delay was due to the unavailability of the victim and appellant's counsel, we see no violation of appellant's right to a speedy trial and we affirm.

FACTS

Appellant Hisham Rawi, while on probation, committed an offense that resulted in his being charged with fifth-degree assault and first degree damage to property on March 10, 2017. At a hearing on March 13, 2017, appellant was ordered to be held without bail on the probation violation. At a hearing on April 13, he rejected the state's plea and demanded a speedy trial. On May 15, the state filed an amended complaint, adding a charge of second-degree assault with a dangerous weapon.

Appellant's trial was originally scheduled for Monday, June 12, 60 days after his speedy-trial demand. Because appellant's counsel was in another trial on that date, appellant's trial was continued for eight days, until June 20. But on June 20, both appellant's counsel and the district court were beginning a homicide trial in a case that had been expected to settle. Because appellant's victim, a necessary witness for the state, was unavailable from June 22 through July 9, the trial was scheduled for July 10.

The jury found appellant guilty of second-degree assault with a dangerous weapon on July 14, 2017. He challenges his conviction, arguing that his right to a speedy trial was violated.

D E C I S I O N

“A speedy-trial challenge presents a constitutional question subject to de novo review.” *State v. Griffin*, 760 N.W.2d 336, 339 (Minn. App. 2009).

Four factors are relevant to a determination of whether the right to a speedy trial has been violated: (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) the prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192 (1972). “The length of the delay is to some extent a triggering mechanism.” *Id.*, 92 S. Ct. at 2192. “In Minnesota, delays beyond 60 days from the date of demand raise a presumption that a violation [of the right to a speedy trial] has occurred.” *State v. Windish*, 590 N.W.2d 311, 315-16 (Minn. 1999); *see also* Minn. R. Crim. P. 11.09(b). Appellant’s trial began 87 days after his demand, or 27 days after the 60-day period.

The first factor, length of delay, has been met; because it is undisputed that appellant asserted his right to a speedy trial, the third factor has also been met. Thus, the second and fourth factors remain to be considered.

Reason for the delay

The key question in evaluating a reason for delay is whether the defendant or the government was more to blame. *State v. Taylor*, 869 N.W.2d 1, 19 (Minn. 2015). Appellant’s trial began 27 days after the 60 days allowed by Minn. R. Crim. P. 11.09(b).

Two-thirds of the 27 days, i.e., the 18-day period from June 22 to July 9, was caused by the unavailability of the victim, for which neither the defendant nor the government was to blame.

The government, or more specifically court-calendar congestion, was to blame for the first third of the delay, i.e., the days from June 12 to June 21, when appellant's counsel was unavailable because of other trials. "Where calendar congestion is the reason for delay, it weighs less heavily against the state than would deliberate attempts to delay trial." *State v. Friberg*, 435 N.W.2d 509, 513 (Minn. 1989) (citing *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192). *Friberg* notes that delays far longer than appellant's 27 days have been found not to violate the right to a speedy trial. *Id.* at 513-14 (citing *State v. Jones*, 392 N.W.2d 224, 234-36 (Minn. 1986) (seven months); *State v. Helenbolt*, 334 N.W.2d 400, 405-06 (Minn. 1983) (14 months); *State v. Rossbach*, 288 N.W.2d 714, 716 (Minn. 1980) (seven months); *State v. Corarito*, 268 N.W.2d 79, 80 (Minn. 1978) (six months)).

Appellant cites *Griffin* for the proposition that "good cause for delay does not include calendar congestion." 760 N.W.2d at 340. But *Griffin* is distinguishable: in that case, "[the] trial [was] not held until eight months following the demand for a speedy trial", *id.* at 337, or six months after the 60-day period set out in Minn. R. Crim. P. 11.09(b). Here, the delay after the 60-day period was less than one month; calendar congestion was responsible for one third of that, and the victim's absence responsible for the other two thirds. The district court did not err in finding good cause for the delay and proceeding with the trial.

Prejudice to appellant

Because appellant's probation officer recommended revocation of probation and the district court concluded that appellant's criminal record of "23 misdemeanors, five felonies, [and] four bench warrants" did not support granting his request for a conditional release, appellant spent the time before trial in jail. "[P]retrial incarceration alone, while unfortunate, is . . . not enough to demonstrate prejudice." *State v. Rhoads*, 802 N.W.2d 794, 807-08 (Minn. App. 2011), *rev'd on other grounds*, 813 N.W.2d 880 (Minn. 2012). Appellant argues that he was prejudiced because his defense would have been improved if he had not been incarcerated before his trial, but does not explain how.

Neither the reason for the delay nor the prejudice to appellant from the delay provides a basis for concluding that appellant's right to a speedy trial was violated.

Affirmed.