STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0386

State of Minnesota,
Respondent,

vs.

Gary Burnette, Jr.,
Appellant.

Filed December 30, 2019
Reversed and remanded
Rodenberg, Judge

Rice County District Court
File No. 66-CR-18-1781

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Tom Weidner, Wendy A. Murphy, Northfield City Prosecutors, Eckberg Lammers, P.C., Stillwater, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Abigail H. Rankin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Ross, Judge; and Jesson, Judge.

U N P U B L I S H E D O P I N I O N

RODENBERG, Judge

Appellant Gary Burnette, Jr., challenges his conviction for fifth-degree assault, arguing that (1) he was deprived of his right to a speedy trial, and (2) he did not validly

waive his right to counsel. Because the record does not establish a valid waiver of appellant's right to counsel, we reverse and remand for a new trial.

FACTS

In July 2018, appellant slapped a grocery store employee after the employee bumped into him with a cart. The state charged appellant with misdemeanor fifth-degree assault.

On August 29, 2018, appellant appeared without counsel for arraignment. The district court inquired of appellant as follows:

> THE COURT: You understand that you have the right to a lawyer in this case?
> THE DEFENDANT: Yes.
> THE COURT: And you understand that you have the right to apply for a public defender if you don't believe you can afford an attorney?
> THE DEFENDANT: Yes.
> THE COURT: Okay. Do you wish to make an application?
> THE DEFENDANT: No.
> THE COURT: Okay. . . . If you do decide to hire an attorney and your attorney is not available for that date, he or she can change the date of the pretrial conference once he or she has filed their certificate of representation with us letting us know that they're representing you.

There was no further discussion at the hearing of whether appellant wanted to represent himself.

On October 15, 2018, appellant appeared without counsel for a plea hearing and confirmed that he was representing himself. There was no conversation about appellant's right to counsel or whether he waived that right. Appellant pleaded not guilty, waived his right to a jury trial, and demanded a speedy trial. The district court set trial for November 30, 2018, within the 60-day window for speedy-trial demands.

On November 30, 2018, appellant appeared for his trial, again without counsel. The district court realized there was a scheduling issue and asked about arranging a new trial date. Appellant told the district court that he was ready and wanted to start his trial because he was having housing issues and appearing at court on yet another date would be a hardship since appellant did not have a car. The district court nevertheless rescheduled the trial for December 13, 2018, still within the speedy-trial window.

On December 12, 2018, the district court rescheduled the trial to December 31, 2018—beyond the speedy-trial window—because of judge unavailability. Appellant moved to dismiss the complaint the following week, arguing in part that the most-recent rescheduling violated his right to a speedy trial.

Appellant appeared several hours late for the December 31, 2018 trial date, purportedly because he could not find a ride to the courthouse. The state's witnesses had left by the time appellant arrived, so the district court rescheduled appellant's trial for February 6, 2019, which was the earliest available trial date. At the state's request, the district court confirmed that appellant wanted a bench trial. The district court did not ask about whether appellant wanted to represent himself and did not obtain a waiver of appellant's right to counsel.

Appellant's trial began on February 6, 2019. The district court advised appellant concerning how trial would proceed. It did not ask whether appellant wanted to represent himself. The district court then heard argument on appellant's motion to dismiss. Appellant argued that he had been prejudiced by the delay because he had been unsure about whether his witness would be able to testify, he had to hire a babysitter to watch his

children, and he had to arrange for transportation to the courthouse. The district court denied the motion to dismiss because it found that good cause existed for the delays and that appellant suffered no prejudice.

The case was tried to the district court, and the district court found appellant guilty of fifth-degree assault.

This appeal followed.

D E C I S I O N

Appellant's right to a speedy trial was not violated.

Appellant argues that the district court and the state violated his right to a speedy trial because the trial did not occur within 60 days of his speedy-trial demand. The state contends that appellant's speedy-trial rights were not violated because the district court had good cause for the trial delays and appellant suffered no prejudice. We address this argument first because, if appellant is entitled to a remedy because of a speedy-trial-right violation, the remedy is dismissal of the charge. *State v. Osorio*, 891 N.W.2d 620, 627 (Minn. 2017). If appellant's speedy-trial rights were violated, there could be no trial on remand.

The United States and Minnesota Constitutions guarantee criminal defendants the right to a speedy trial. U.S. Const. amend. VI; Minn. Const. art. I, § 6; *State v. DeRosier*, 695 N.W.2d 97, 108 (Minn. 2005). We apply a four-factor balancing test to determine whether a speedy-trial violation occurred: (1) the length of the delay, (2) the reasons for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) whether the delay prejudiced the defendant. *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999)

(citing *Barker v. Wingo*, 407 U.S. 514, 530-33, 92 S. Ct. 2182, 2192-93 (1972)). We review alleged speedy-trial violations de novo. *Osorio*, 891 N.W.2d at 627.

The first factor, the length of delay, is a "triggering mechanism which determines whether further review is necessary." *Windish*, 590 N.W.2d at 315 (quotation omitted). In Minnesota, a trial must begin within 60 days from the date of the speedy-trial demand. Minn. R. Crim. P. 11.09(b). A delay beyond 60 days creates a presumption that a violation has occurred. *State v. Taylor*, 869 N.W.2d 1, 19 (Minn. 2015).

Here, appellant demanded a speedy trial on October 15, 2018. This presumptively required appellant's trial to begin no later than December 14, 2018. *See* Minn. R. Crim. P. 11.09(b). After several continuances of the trial date occasioned by the district court's calendar, appellant did not appear on time for trial on December 31, 2018. The district court then rescheduled the trial to February 6, 2019, when the case was tried. The December 31, 2018 trial date was 17 days beyond the speedy-trial window. Although this delay is de minimis, it creates a presumptive violation of appellant's right to a speedy trial. The first factor therefore weighs in appellant's favor.

The second factor analyzes "whether the government or the criminal defendant is more to blame for the delay." *Osorio*, 891 N.W.2d at 628 (quotations omitted). We consider delays caused by the state and the courts together for this factor. *See State v. Cham*, 680 N.W.2d 121, 125 (Minn. App. 2004), *review denied* (Minn. July 20, 2004). Deliberate attempts to delay trial weigh heavily against the state, *Osorio*, 891 N.W.2d at 628 (quotation omitted), whereas more neutral reasons like court calendar congestion weigh less heavily, *State v. Friberg*, 435 N.W.2d 509, 513 (Minn. 1989).

There are two delays at issue here. The first is the 17-day delay between the end of the speedy-trial window on December 14, 2018, and the scheduled trial date on December 31, 2018. The second is the 37-day delay between December 31, 2018, and the February 6, 2019 trial. Appellant concedes that the 37-day delay is attributable to his late appearance to court on December 31, but argues that the 17-day delay from December 14 to December 31 weighs in favor of reversal.

In *State v. Griffin*, a district court rescheduled the defendant's trial at least 30 times over six months because of its congested calendar. 760 N.W.2d 336, 339 (Minn. App. 2009). On the second factor of the speedy-trial-violation balancing test, we emphasized that the defendant was not responsible for any of the continuances and that no exceptional circumstances justified the delays. *Id.* at 340. We determined that the second factor, the reason for the delay, weighed in favor of a speedy-trial violation and ultimately reversed. *Id.* at 340-42.

Like in *Griffin*, the district court's congested calendar is responsible for the 17-day delay. Appellant is not responsible for that delay and objected to it immediately. There is no indication in the record that the state deliberately delayed appellant's trial, as evidenced by the state's appearing at each scheduled trial date, on time, with witnesses present and ready to testify. The 17-day delay thus weighs in favor of a violation of appellant's speedy-trial rights because the delay was caused by the district court's congested calendar, but we give it little weight because the delay was not deliberate. *See Friberg*, 435 N.W.2d at 513.

The third factor is whether appellant asserted his right to a speedy trial. *Windish*, 590 N.W.2d at 315. The state and appellant agree that appellant properly and timely

asserted his right to a speedy trial at his plea hearing and again in his motion to dismiss. The record supports this. This factor weighs in favor of a speedy-trial violation.

The final factor analyzes the prejudice suffered by the defendant as a result of the delay. *Id.* We consider three types of interests here: "(1) preventing oppressive pretrial incarceration; (2) minimizing the anxiety and concern of the accused; and (3) preventing the possibility that the defense will be impaired." *Id.* at 318. The third of these interests, preventing the possibility that the defense will be impaired, is the most serious. *Id.*

Appellant told the district court several times that he had trouble appearing for court because he did not have a car, had a busy personal life, and wanted to finish the trial sooner rather than later. On appeal, appellant contends that the delays impacted his personal life, interfered with his ability to handle a housing issue, caused him to lose work, caused him to incur additional expenses, and "amplified rather than minimized his anxiety and concern." Even assuming these claims to be true, these types of general stress, anxiety, and inconvenience are not unique to appellant but are common among all persons involved in a trial. *See Friberg*, 435 N.W.2d at 515. Appellant has shown no additional stress, anxiety, or inconvenience beyond that which is experienced by all criminal defendants. Appellant was not incarcerated during the 17-day delay (or otherwise), nothing in the record suggests a loss of evidence or testimony, and appellant was not hampered in preparing his defense. Nor has appellant identified any way in which the 17-day delay prejudiced his defense. Here, the complete absence of any prejudice to appellant caused by the short trial delay strongly weighs against a violation of appellant's speedy-trial rights.

On balance, the absence of any prejudice suffered by appellant outweighs the de minimis delay caused by the district court's busy calendar. We therefore conclude that appellant's speedy-trial rights were not violated.

The record does not establish a valid waiver of appellant's right to counsel.

Appellant argues that the district court erred by failing to obtain a valid waiver of his right to counsel, either orally or on the record.

The United States and Minnesota Constitutions guarantee criminal defendants the right to counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6; *see also Gideon v. Wainwright*, 372 U.S. 335, 343-45, 83 S. Ct. 792, 796-97 (1963). The right to counsel extends to misdemeanor cases. *State v. Nordstrom*, 331 N.W.2d 901, 903 (Minn. 1983). By statute, "[w]here counsel is waived by a defendant, the waiver shall in all instances be made in writing, signed by the defendant, except that in such situation if the defendant refuses to sign the written waiver, then the court shall make a record evidencing such refusal of counsel." Minn. Stat. § 611.19 (2018). The Minnesota Rules of Criminal Procedure similarly provide that criminal defendants charged with a misdemeanor "who appear without counsel, do not request counsel, and wish to represent themselves, must waive counsel in writing or on the record." Minn. R. Crim. P. 5.04, subd. 1(3).

If a defendant chooses to represent himself, the district court must ensure that the defendant's waiver of counsel is knowing and intelligent. *State v. Hawanchak*, 669 N.W.2d 912, 915 (Minn. App. 2003). "Where there is no record of a defendant's waiver of counsel, it is impossible to determine upon appellate review whether a waiver was knowing and intelligent." *Id.* at 915. "In such instances, the defendant is entitled to a new

trial" because "a denial of the right to counsel does not require a showing of prejudice to obtain reversal." *Id.*

Here, the district court touched on appellant's right to counsel only twice during the various hearings: once during appellant's arraignment when the district court asked whether appellant wanted to apply for a public defender, and once during appellant's plea hearing when the district court asked whether appellant was representing himself. The district court did not question appellant on either occasion about whether he knowingly and intelligently waived his right to counsel. Appellant did not want to apply for a public defender, but he never waived his right to an attorney and was never asked whether he waived that right. The district court did not refer to or provide appellant with Minn. R. Crim. P. Form 11, Petition to Proceed as Pro Se Counsel, at any point during the proceedings.[1] At best, a generous reading of the district court's limited questioning establishes that appellant waived the option to ask for a public defender—a far cry from waiving his constitutional right to counsel.

The record is insufficient to permit a conclusion that appellant waived his right to counsel by conduct or forfeiture. *See State v. Jones*, 772 N.W.2d 496, 505 (Minn. 2009) (holding that a criminal defendant may be found to have waived or forfeited the right to counsel by dilatory conduct). We see nothing in the record that would even remotely suggest any such conduct by appellant here.

[1] We encourage district courts to use Form 11 when establishing a waiver of the right to counsel.

We also note that, because appellant does not have an extensive criminal history and appellant was not previously represented by counsel in this matter, this is not a situation in which we can infer a knowing and intelligent waiver. *See State v. Worthy*, 583 N.W.2d 270, 276 (Minn. 1998) (stating that an on-the-record inquiry concerning waiver of counsel was unnecessary where a defendant fired his attorney and had experience with the criminal justice system); *see also State v. Krejci*, 458 N.W.2d 407, 412-13 (Minn. 1990) (holding that an on-the-record inquiry concerning waiver of counsel was unnecessary where a defendant was unwilling to accept representation from public defenders and had extensive conversations on the matter with multiple judges).

The record does not establish a knowing and intelligent waiver of appellant's right to counsel. The constitution therefore requires reversal and remand for a new trial.

Reversed and remanded.