STATE OF MINNESOTA
IN COURT OF APPEALS
A11-42

State of Minnesota,
Respondent,

vs.

Michael Lee Jarvi,
Appellant.

Filed November 21, 2011
Affirmed
Kalitowski, Judge

Itasca County District Court
File No. 31-CR-09-3239

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

John J. Muhar, Itasca County Attorney, Lori J. Flohaug, Assistant County Attorney, Grand Rapids, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Kalitowski, Judge; and Peterson, Judge.

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

KALITOWSKI, Judge

Following a court trial on stipulated facts, appellant Michael Lee Jarvi challenges his convictions of second-degree test refusal, third-degree driving while impaired, driving

after revocation, and possession of drug paraphernalia. Appellant argues that the district court erred in granting the state's motion to reconsider dismissal of the complaint. We affirm.

D E C I S I O N

Appellant was charged on October 18, 2009, with second-degree refusal to submit to a chemical test, third-degree driving while impaired, driving after revocation, and possession of drug paraphernalia. The case against appellant did not proceed rapidly to trial. Several pretrial hearings were rescheduled because the state either had not produced the discovery appellant requested, or had only produced discovery just prior to the hearing. On the eve of trial, appellant learned that the state had inadvertently failed to turn over a *Mirandized* statement given by appellant to the investigating state trooper. The trial was continued and appellant moved for dismissal based on the state's pattern of late discovery and its failure to disclose the *Mirandized* statement.

The state turned the statement over to appellant on February 8, 2010, but failed to file a formal response to appellant's motion to dismiss as the district court requested. At a hearing on February 22, the district court dismissed the criminal complaint from the bench, citing the state's discovery violations and failure to comply with the district court's order for submissions. On March 10, 2010, the state moved for reconsideration. The district court granted the motion, explaining that its earlier decision rested in part on its mistaken belief that the state had not turned over the statement at the time the court dismissed the complaint. On the reinstated complaint, appellant submitted to a stipulated-facts trial and was convicted on all four counts.

For the first time on appeal, appellant argues that the state's motion to reconsider was untimely, and that the district court therefore erred by granting the motion and reinstating the complaint. A district court's decision to grant a motion for reconsideration will not be disturbed absent an abuse of discretion. *State v. Papadakis*, 643 N.W.2d 349, 356 (Minn. App. 2002). But to the extent we interpret the rules of criminal procedure, we do so de novo. *Ford v. State*, 690 N.W.2d 706, 712 (Minn. 2005).

Although the rules of criminal procedure do not specifically authorize motions to reconsider, the supreme court has recognized the district court's inherent authority "to entertain and grant a motion to reopen made by the state before the state's time to file a pretrial appeal has expired." *State v. Montjoy*, 366 N.W.2d 103, 107 (Minn. 1985). "At times, a motion for reconsideration may be the most efficient and preferable course of action, and it can spare parties the time, trouble, and expense of an appeal." *Papadakis*, 643 N.W.2d at 357. Unless the time for appeal has been extended, the state has five days from the issuance of the adverse pretrial order to file an appeal. Minn. R. Crim. P. 28.04, subd. 2(8).

Citing *Montjoy* and this court's decision in *State v. Palmer*, appellant contends that the state's pretrial appeal deadline governs motions to reconsider. *State v. Palmer*, 749 N.W.2d 830, 831 (Minn. App. 2008). Thus, appellant argues, because the state filed its motion after the time for appeal, the state's motion was untimely. We disagree.

First, we note that neither *Montjoy* nor *Palmer* is dispositive here. In *Montjoy*, the supreme court was asked to decide whether the state could request the district court to reconsider a pretrial order or whether the state's sole remedy was to appeal. 366 N.W.2d

at 107. In *Palmer*, the issue was whether a motion to reconsider, made after the appeal deadline, extended the time for appeal. 749 N.W.2d at 831. Thus, neither case addressed whether the district court has the authority to hear a pretrial motion to reconsider that was filed after the appeal deadline. And we need not reach this question here, because we conclude that the district court's dismissal of the complaint was not an appealable order, and so the time limit for appeal did not apply.

Minn. R. Crim. P. 28.04, subd. 1 establishes the general rule that the state may appeal from any pretrial order. But "a pretrial order cannot be appealed if the court dismissed a complaint for lack of probable cause premised solely on a factual determination, or if the court dismissed a complaint under Minn. Stat. § 631.21[.]" Minn. R. Crim. P. 28.04, subd. 1(1).

Because neither exception applies here, we apply the critical impact analysis. A reviewing court will only reverse a pretrial order if the state demonstrates clearly and unequivocally that the district court erred in its judgment and the error will have a critical impact on the outcome of the trial. *State v. Kim*, 398 N.W.2d 544, 547 (Minn. 1987). "[I]n the absence of a critical impact we will not review a pretrial order." *State v. McLeod*, 705 N.W.2d 776, 784 (Minn. 2005). The Minnesota Supreme Court recently held that rule 28.04 "requires the State to show critical impact in all pretrial appeals and there is no exception for an appeal from a discovery order." *State v. Underdahl*, 767 N.W.2d 677, 682 (Minn. 2009).

To show critical impact here, the state would have been required to demonstrate that dismissal "significantly reduce[d] the likelihood of a successful prosecution." *Kim*,

398 N.W.2d at 551. Critical impact exists where a complaint is dismissed on grounds that effectively bar further prosecution. *See, e.g.*, *State v. Dunson*, 770 N.W.2d 546, 550 (Minn. App. 2009) (concluding that critical impact existed where dismissal for lack of probable cause based on a question of law made it "highly unlikely that a prosecuting attorney could reinstate a case"). Conversely, a dismissal that does not prevent reissuance of the complaint lacks critical impact and is not appealable.

Here, the district court dismissed the complaint from the bench, citing the state's failure to comply with discovery or to file a response. Thus, the dismissal was based entirely on procedural grounds. The district court drew no legal conclusions that would have limited the state's ability to prosecute appellant anew. And at the time of dismissal, the jury had not yet been sworn, so jeopardy had not yet attached. *See State v. McDonald*, 298 Minn. 449, 452, 215 N.W.2d 607, 608-09 (1974) (holding that jeopardy attaches only after the jury is impaneled and sworn).

On these facts there is nothing to indicate that the district court's order would have effectively prevented further prosecution. Therefore, we conclude that the dismissal order was not appealable, and the state's remedy was to re-file the complaint or "try to get the court to reconsider its decision." *State v. Fleck*, 269 N.W.2d 736, 737 (Minn. 1978). The state sought reconsideration so that the district court could correct its own mistake of fact. Because the district court's order was not appealable, the state was not constrained by the time for appeal and its motion for reconsideration was properly before the district court.

Affirmed.