STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1956

State of Minnesota,
Respondent,

vs.

Charlie Lewis,
Appellant.

Filed December 1, 2009
Affirmed in part, reversed in part, and remanded
Shumaker, Judge

Hennepin County District Court
File No. 27-CR-08-597

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Hudson, Presiding Judge; Lansing, Judge; and Shumaker, Judge.

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

SHUMAKER, Judge

After a jury found him guilty of criminal sexual conduct and the district court imposed sentence, appellant appealed, claiming that he did not validly waive his right to counsel, that standby counsel was ineffective, that he was deprived of his right to a speedy trial, and that the district court erred in calculating his criminal-history score. Because the record demonstrates that there was no valid waiver of the right to counsel, we reverse appellant's conviction and remand for further proceedings. We also conclude that appellant's criminal-history score was improperly calculated. Appellant has not demonstrated that his right to a speedy trial was infringed, and, thus, we affirm on that issue. Because of our disposition, we need not determine appellant's claim of ineffectiveness of standby counsel.

FACTS

Appellant Charlie Lewis, who was pro se throughout his jury trial, contends that he did not validly waive his right to counsel, that the district court erred in denying a speedy-trial motion for dismissal, that standby counsel was ineffective, and that the district court improperly added four felony points to his criminal-history score.

When Lewis made his first court appearance on January 7, 2008, to answer to charges of criminal sexual conduct, the district court appointed the public defender to represent him. It appears that trial was to begin on April 14, 2008, but on that date defense counsel moved for a two-week continuance because he wanted to review a DNA

report he had just received. Despite expressing concern about Lewis's right to a speedy trial, the district court granted the continuance.

The matter did not return to court until May 19, 2008, when it was set for a scheduling conference. Citing a conflict of interest with his attorney, Lewis asked the court to appoint a different attorney to defend him. The court declined that request. Lewis then indicated that he could not afford to hire a lawyer and that he would rather proceed pro se than have his current counsel represent him. In its order of May 19, 2008, appointing "back-up counsel," the court found that "[t]he charges against Defendant are too serious to fully dismiss Defendant's counsel. Defendant may proceed pro se if he desires. The Court will nonetheless appoint Defendant's current counsel to serve as back-up counsel in the event Defendant wishes to use him at trial."

On June 23, 2008, Lewis moved to dismiss all charges for violation of the Speedy Trial Act. He argued that his public defender was "in cahoot[s]" with the prosecutor and had obtained a continuance of the trial without Lewis's knowledge or consent. Noting that the delays in setting the case for trial resulted from defense counsel's request for a continuance and court scheduling difficulties, the district court denied the motion to dismiss.

Trial began on June 25, 2008. Lewis proceeded pro se, with the public defender originally appointed to represent him serving as standby counsel. After jury selection, but before the court's preliminary charge, standby counsel requested that he be permitted to leave the courtroom to attend to another matter. The court asked Lewis if he objected to counsel's absence, and Lewis replied, "What, the incompetent lawyer?" The court

then permitted standby counsel to leave, instructing him to return "as soon as you can," and the court gave its preliminary charge during counsel's absence. The record does not show the point at which standby counsel returned. It appears that Lewis did not consult with standby counsel at any time during the trial. On July 1, 2008, the jury found Lewis guilty of one count of first-degree and one count of third-degree criminal sexual conduct.

In sentencing Lewis on the count of first-degree criminal sexual conduct, the district court included in his criminal-history score four felony drug offense convictions from Illinois. Lewis objected, claiming that he had never been convicted in Illinois of those crimes. The evidence of the convictions consisted of certified copies of convictions in the name "Charlie Lewis" and other documents from the Illinois courts. The court relied on those documents in sentencing.

This appeal followed.

D E C I S I O N

Waiver of Counsel

Lewis argues that he did not validly waive his right to counsel because the district court failed to ensure that his waiver was made knowingly, intelligently, and voluntarily. We agree, and we note at the outset that, even though the court prudently appointed standby counsel, it was clear to the court from May 19, 2008, forward, that Lewis intended to represent himself at trial. That fact triggered the requirement that the court follow the rules governing a criminal defendant's waiver of counsel.

Criminal defendants have a fundamental constitutional right to the assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6. A criminal defendant may

waive his right to the assistance of counsel, but such a waiver must be voluntary, knowing, and intelligent. *Edwards v. Arizona*, 451 U.S. 477, 482, 101 S. Ct. 1880, 1884 (1981); *State v. Worthy*, 583 N.W.2d 270, 276 (Minn. 1998). Thus, we review defendant's waiver of the right to counsel to determine whether the "record supports a determination that [a defendant] knowingly, voluntarily, and intelligently waived his right to counsel." *State v. Garibaldi*, 726 N.W.2d 823, 829 (Minn. App. 2007). In analyzing the validity of the waiver, we consider all of the surrounding facts and circumstances, including the background, experience, and conduct of the accused. *Edwards*, 451 U.S. at 482, 101 S. Ct. at 1884; *In re Welfare of G.L.H.*, 614 N.W.2d 718, 723 (Minn. 2000) (citing *Worthy*, 583 N.W.2d at 275-76).

Minnesota law requires a defendant's waiver of the right to counsel to be in writing or orally on the record if a defendant refuses to sign the written waiver. Minn. Stat. § 611.19 (2006); Minn. R. Crim. P. 5.02, subd. 1(4). In addition, before accepting a waiver of the right to counsel, the district court is required to advise the defendant of

> the nature of the charges, the statutory offenses included within the charges, the range of allowable punishments, that there may be defenses, that there may be mitigating circumstances, and all other facts essential to a broad understanding of the consequences of the waiver of the right to counsel, including the advantages and disadvantages of the decision to waive counsel.

Minn. R. Crim. P. 5.02, subd. 1(4). Following this procedure fulfils the district court's duty to be satisfied that the defendant's waiver is knowing, voluntary and intelligent. *State v. Krejci*, 458 N.W.2d 407, 412 (Minn. 1990). It also ensures that the "record will establish that '[the defendant] knows what he is doing and his choice is made with eyes

open.'" *State v. Camacho*, 561 N.W.2d 160, 173 (Minn. 1997) (quoting *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541 (1975)).

Lewis protests that the district court did not comply with the statute or the rule, and failed to engage him in the requisite "penetrating and comprehensive examination of understanding the crime charged, the range of allowable punishments, the possible defenses, any possible mitigating circumstances, and any other relevant factors." Respondent State of Minnesota acknowledges that the record shows that the district court neither obtained a written waiver nor engaged in the requisite pre-waiver advisory inquiry of the factors listed in Minnesota Rule of Criminal Procedure 5.02, subdivision 1(4), but the state contends that Lewis's waiver was valid nevertheless.

Although the district court's strict adherence to the statute and rule governing the waiver of the right to counsel would likely obviate an appeal on that issue, the failure of the court to strictly adhere to the law is not per se error, but rather the facts of the case must be scrutinized to determine the validity of the waiver. *Garibaldi*, 726 N.W.2d at 828-29 (citing *In re G.L.H.*, 614 N.W.2d at 723 (recognizing that waivers have been held valid when demonstrated by specific facts even though the district court failed to follow the requisite procedures for waiver of counsel)). However, it seems that a circumstantial waiver based on the facts of the case is an exception to the statute and rule. This is the implication of the Minnesota Supreme Court's recent admonition that ". . . *we require* district courts, before accepting a waiver of the right to counsel, to fully advise the defendant by *intense inquiry* regarding the nature of the charges, the possible punishment,

mitigating circumstances . . . ," and the consequences of the waiver. *State v. Jones*, 772 N.W.2d 496, 504 (Minn. 2009) (emphasis added).

Here, the district court told Lewis only that he should be represented by counsel because of the serious nature of the charges against him, and the court warned him that he was "sealing [his] fate here by refusing the assistance" of the public defender. That was the full extent of the court's advisory, and the court made no inquiry at all respecting Lewis's understanding of his rights and of the consequences of his waiver.

Although it can sometimes be presumed, as noted in *Worthy*, 583 N.W.2d at 276, that defense counsel has explained to the defendant the risks and possible consequences of proceeding pro se, the record here does not either expressly or inferentially support that presumption. On the contrary, the record shows that at least by May 19, 2008, the relationship between Lewis and his appointed attorney was severely strained and that Lewis was not even speaking to counsel let alone accepting legal advice of any sort from him. *See Garibaldi*, 726 N.W.2d at 829 (holding waiver of counsel invalid and emphasizing that record was "silent regarding whether Garibaldi was sufficiently informed by previous counsel of the consequences of representing himself").

Even though we do not fault the district court for appointing standby counsel, that appointment does not alter the fact that Lewis had waived counsel entirely. He did not request standby counsel, and he made it clear that he would not rely on the appointed lawyer for any guidance. In this factual posture, the pre-waiver advisory and inquiry were necessary, and, because the record does not show that they occurred, we reverse on this issue.

Criminal-History Score

Although we have reversed Lewis's conviction, we address the district court's sentencing error in the event that the issue arises in the future.

Under the Minnesota Sentencing Guidelines, a felony sentence is determined by considering the severity level of the crime and the defendant's prior criminal convictions. Minn. Sent. Guidelines II (2009). Each prior felony conviction is assigned a point value, depending on the severity of the offense. *Id.* at II.B.1. All properly assigned felony points, together with a defendant's custody status, juvenile, and any misdemeanor or gross-misdemeanor points, cumulatively produce the defendant's criminal-history score. *Id.* at II.B. Thus, each criminal-history point may result in an increase in the presumptive sentence for the defendant's current offense. *Id.* at II.C; IV. The district court assigned to Lewis four points, one for each of four prior felony convictions in Illinois under the name "Charlie Lewis." Lewis contends that he is not the "Charlie Lewis" who has been convicted of the four Illinois crimes that the district court relied upon in sentencing him.

The state has the burden of establishing the facts necessary to justify consideration of an out-of-state conviction used to determine a defendant's criminal-history score. *State v. McAdoo,* 330 N.W.2d 104, 109 (Minn. 1983). The state must establish by a fair preponderance of the evidence that the prior conviction was valid, the defendant was the person involved, and that the crime constituted a felony in Minnesota. *State v. Griffin,* 336 N.W.2d 519, 525 (Minn. 1983). A fair preponderance of the evidence "means that it must be established by a greater weight of the evidence. It must be of a greater or more convincing effect and . . . lead you to believe that it is more likely that the claim . . . is

true than . . . not true." *State v. Wahlberg*, 296 N.W.2d 408, 418 (Minn. 1980). "The district court's determination of a defendant's criminal-history score will not be reversed absent an abuse of discretion." *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006) (citing Minn. Sent. Guidelines cmt. II.B.504).

At Lewis's sentencing, the state introduced "certified copies" of four Illinois felony drug convictions listing the defendant's name as "Charlie Lewis." These certified copies made no reference to the defendant's date of birth, social security number, or any other information that would help identify the defendant. The state also introduced court documents from the Illinois cases that resulted in the convictions. These listed various birthdates for the defendant "Charlie Lewis" named in those cases. Specifically, the state produced documentation from two 1990 convictions for possession with intent to deliver heroin and cannabis that listed the defendant's birth date as March 5, 1971; a 2000 conviction for possession with intent to deliver cocaine, with documentation listing the defendant's birthday as February 20, 1978; and a 2003 conviction for possession with intent to deliver cannabis, including documentation listing the defendant's birthday as February 2, 1978.

A careful review of the state's evidence shows that the only established fact linking the four Illinois drug convictions to Lewis is the name "Charlie Lewis." The state concedes that none of the birth dates listed in the documentation matches the dates of birth known to have been used by appellant Lewis. And contrary to the state's assertion at sentencing, none of the four Illinois drug convictions were listed in the Bureau of Criminal Apprehension's "rap sheet" for Lewis. The state offered no other proof that

Lewis was the defendant in the Illinois cases, that he had lived at any of addresses listed in the Illinois documents, that he shared any physical characteristics similar to that of the defendant in those crimes, or that he had even been present in Illinois when the convictions occurred. Absent some other identifying information, documentation of out-of-state convictions bearing the same rather common name as the defendant is insufficient to meet the state's burden of showing that Lewis has four felony convictions that can be used in computing his criminal-history score.

The facts of Lewis's case may be contrasted with those in *State v. Jackson*, 358 N.W.2d 681 (Minn. App. 1984). In *Jackson*, the state introduced evidence of the defendant's out-of-state felony conviction through the testimony of a probation officer, who advised the court that the "Los Angeles file contained Jackson's date of birth, his place of birth and his parent's names, which was the same information [Jackson] gave" to the probation officer. *Id.* at 683. Given that Jackson did not object to his probation officer's testimony, the supreme court concluded that the district court "correctly found the state proved [Jackson] had a prior conviction for forgery in California." *Id.* Here, a *quantity* of papers was introduced showing only the existence of the four convictions of a person with the same name as the appellant Lewis, but there was simply no identifying information—other than the name—to connect Lewis with the crimes. The quality of proof offered by the state in *Jackson* is far more detailed than that provided here. Therefore, the district court abused its discretion by including these four convictions in Lewis's criminal-history score, and this issue must be reversed.

Pro se Issues

In his pro se supplemental brief, Lewis contends that he was denied his right to a speedy trial and that his appointed defense counsel's assistance was ineffective both during his representation of Lewis and as standby counsel.

Speedy Trial

Lewis contends that he was denied his right to a speedy trial. On this issue we affirm the district court. Whether a defendant has been denied the right to a speedy trial is a constitutional question, which is reviewed de novo. *State v. Cham*, 680 N.W.2d 121, 124 (Minn. App. 2004), *review denied* (Minn. July 20, 2004).

The United States and Minnesota constitutions provide that in all criminal prosecutions, "the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI; Minn. Const. art. I, § 6. In determining whether a delay has deprived the defendant of the right to a speedy trial, Minnesota courts apply the four-part balancing test set forth in *Barker v. Wingo*, 407 U.S. 514, 530-32, 92 S. Ct. 2182, 2192-93 (1972). *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999). The four *Barker* factors are (1) the length of the delay, (2) the reason for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) whether the delay prejudiced the defendant. *Id.* The factors must be considered together in light of the relevant circumstances, and none is dispositive or necessary to a finding that a defendant has been deprived of the right to a speedy trial. *Id.*

A. *Length of the Delay*

The first *Barker* factor is "a triggering mechanism in that until some delay. . . is evident the other factors need not be considered." *State v. Jones*, 392 N.W.2d 224, 235 (Minn. 1986). Generally, a delay is presumptively excessive if the trial is not commenced within 60 days after the defendant makes the demand. *State v. Friberg*, 435 N.W.2d 509, 513 (Minn. 1989); *State v. Mahr*, 701 N.W.2d 286, 292 (Minn. App. 2005), *review denied* (Minn. Oct. 26, 2005).

The record is unclear as to the exact date that Lewis demanded a speedy trial. The state argues that Lewis demanded a speedy trial on May 19, 2008. Lewis maintains that he demanded the speedy trial at his first appearance on January 4, 2008. On April 14, 2008, the district court accepted as fact that a speedy trial demand had *previously* been made. Minnesota Rule of Criminal Procedure 11.10 states that "the time period [for a speedy trial demand] shall not begin to run earlier than the date of the plea other than guilty." That date is the date of the omnibus hearing. Minn. R. Crim. P. 8.01. It is not clear whether and when an omnibus hearing was held in this case. "The demand for a speedy trial . . . must be made on the record to give all parties notice of when to start the clock running." *State v. Rachie*, 427 N.W.2d 253, 257 (Minn. App. 1988), *review denied* (Minn. Sept. 20, 1988); Minn. R. Crim. P. 11.10. Given the inconclusive nature of the record, the only date upon which the demand could be construed to have occurred is April 14, 2008. *See State v. Anderson*, 351 N.W.2d 1, 2 (Minn. 1984) (holding that an appellant claiming trial error had the burden of providing a complete transcript or equivalent record).

Trial commenced on June 23, 2008, 69 days after Lewis's first recorded demand was made. That delay exceeds 60 days and therefore raises a presumption that a violation occurred, requiring consideration of the other *Barker* factors. *See Friberg*, 435 N.W.2d at 513; *Mahr*, 701 N.W.2d at 292. Thus, this factor weighs in Lewis's favor.

B. *Reason for the Delay*

In assessing the reason for the delay, "different weights should be assigned to different reasons" for the delay. *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192. There appear to be three reasons for the delay of Lewis's case from April 14 to June 23: (1) the late arrival of DNA evidence; (2) the public defender's request for a two-week continuance to review the evidence; and (3) resulting scheduling difficulties. Although deliberate attempts to delay the trial are weighted "heavily" against the state, "neutral" reasons for delay, such as negligence or overcrowded courts, are accorded less weight. *Id.* When the overall delay is due to the defendant's actions, no speedy trial violation occurs. *State v. Johnson*, 498 N.W.2d 10, 16 (Minn. 1993).

Here, the late arrival of the DNA results is a neutral reason for delay. *See State v. Stroud*, 459 N.W.2d 332, 335 (Minn. App. 1990) (prosecution's request for continuance to obtain DNA evidence was good cause for delay). Lewis did not object on the record when his counsel requested the continuance to review the DNA evidence. The resulting scheduling difficulties are also neutral reasons for the delay. Thus, this factor weighs in favor of the state.

C. *Assertion of Speedy Trial Right*

In looking at this factor, the force and frequency of the defendant's demand for trial must be considered. *Friberg*, 435 N.W.2d at 515. Lewis has been insistent that his right to a speedy trial has been violated since May 19, 2008. He repeated his concern in a May 27, 2008 letter to the court, and requested dismissal on this basis on June 23, 2008. This factor weighs in Lewis's favor.

D. *Prejudice*

The prejudice factor is measured in light of the interests that the speedy-trial right was designed to protect. *Barker*, 407 U.S. at 532, 92 S. Ct. at 2193. Three interests must be assessed: (1) preventing oppressive pretrial incarceration, (2) minimizing the accused's anxiety and concern, and (3) limiting the possibility that the defense will be impaired. *Id.* The third interest is the most important. *Id.*

Lewis was incarcerated for 173 days prior to trial. "Pretrial incarceration may be unfortunate, [but it] is not a serious allegation of prejudice." *Stroud*, 459 N.W.2d at 335 (citations omitted). And while Lewis understandably asserts that the delay caused him stress and anxiety, his claim that the delay "hindered" his ability to contact witnesses and gather evidence makes no sense. If Lewis's demand was made on April 14, the resulting delay of 9 days past the 60-day deadline could hardly be seen as prejudicial. This factor weighs against Lewis.

Given the short delay between the recorded demand and the beginning of trial, the neutral reasons for delay, and the lack of prejudice, we conclude that Lewis's right to a speedy trial was not violated.

Ineffective Assistance of Standby Counsel

Although this issue is neither dispositive nor adequately supported with argument and authority, we will briefly address one aspect of it for future guidance. *See State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (stating that appellate courts need not address arguments unsupported by authority).

It is no less than ironic that a criminal defendant who fires his lawyer, refuses to use the assistance of that lawyer even as standby counsel, and makes it clear that he would not rely on that lawyer for any legal guidance, nevertheless complains that his standby counsel's trial assistance was ineffective. This contention arises from standby counsel's absence from a portion of the trial. After the jury had been selected but before the court's preliminary jury charge, standby counsel asked to be excused to attend to another matter. The court asked Lewis if he objected, and he replied, "What, the incompetent lawyer?" The court took this to mean that Lewis did not object, and the court gave its preliminary charge in standby counsel's absence. This was error which, in the context of this appeal and its outcome, does not require full analysis.

In *State v. Parson*, we stated that "once the trial court makes the decision to appoint standby counsel, that standby counsel must be physically present in the courtroom from the time of appointment through all proceedings until proceedings conclude." 457 N.W.2d 261, 263 (Minn. App. 1990), *review denied* (Minn. July 31, 1990). We stated the reason for this rule:

> It can never be assumed that the emphatic denial of offered assistance, as we have here, is the pro se defendant's final word. When they do change their minds and request standby

> counsel to take over a defense or render some temporary assistance, the damage done by standby's previous absence is irreversible.

Id.

Lewis contends that he did not understand some of the legal terms the court used in its preliminary charge and he might have requested assistance from standby counsel. The context of the record makes this doubtful, but *Parson* established the applicable rule.

Lewis also complains about his lawyer's failure to investigate the case and his request for a continuance without Lewis's consent. Because Lewis is entitled to a new trial on other grounds, we need not reach these issues.

Affirmed in part, reversed in part, and remanded.