STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2000

State of Minnesota,
Respondent,

vs.

Maurice Clinton,
Appellant.

Filed September 29, 2009
Affirmed
Larkin, Judge

Ramsey County District Court
File No. 62-K3-07-003210

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

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, 50 West Kellogg Boulevard, Suite 315, St. Paul, MN 55102 (for respondent)

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

Considered and decided by Halbrooks, Presiding Judge; Johnson, Judge; and Larkin, Judge.

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

LARKIN, Judge

Appellant seeks reversal of his conviction of third-degree sale of a controlled substance, arguing that he was denied a speedy trial. Because we conclude that appellant's constitutional right to a speedy trial was not violated, we affirm.

FACTS

On April 4, 2007, appellant Maurice Clinton sold crack cocaine to an undercover officer in downtown St. Paul. Two months later, Clinton was arrested and charged with third-degree sale of a controlled substance. In July 2007, Clinton made a written demand for a speedy trial. Clinton appeared for trial on August 28, 2007. Before the district court called in the jury panel, the prosecutor moved to amend the complaint to include a mandatory sentencing provision. The district court denied the motion as untimely. The state therefore dismissed the complaint, and Clinton was released.

The state recharged Clinton one week later. Clinton was arrested on September 21, and granted conditional release on the same day. In October 2007, Clinton pleaded not guilty, and the district court set a trial date for the following month. On November 13, 2007, Clinton made a written demand for a speedy trial. One week later, the parties appeared and were ready for trial. The district court continued the trial and ordered that Clinton remain "on-call," meaning that Clinton had to be available for trial within two hours of his attorney receiving notification that trial would commence.

There was no activity on Clinton's case for the next four months. On February 29, 2008, the district court revoked Clinton's conditional release because he had failed to

remain in contact with probation, tested positive for drugs, missed ten chemical tests, and had been arrested on three separate occasions. The district court then scheduled a trial for March 10, 2008.

The district court was not able to try the case on March 10, 2008. Clinton renewed his demand for a speedy trial. The prosecutor argued that Clinton's behavior leading to revocation of his release constituted waiver of the speedy-trial demand. The district court ruled that Clinton had not waived his demand to a speedy trial but that his right to a speedy trial had not been violated because he had been at liberty from September 21, 2007 to February 29, 2008. The court again continued the matter, stating that the case would be tried as soon as the court calendar permitted.

On March 31, 2008, the parties appeared for trial, but the matter was continued because defense counsel was in another trial. Through substitute defense counsel, Clinton moved for conditional release. The district court noted the repeated delays in Clinton's trial, granted the conditional release, and scheduled the trial for May 2008. The district court also stated its belief that under the rules of criminal procedure, it could not dismiss the case because the state could "always recharge it."

Clinton was tried on two days in May 2008, and a jury found him guilty of third-degree sale of a controlled substance. He was sentenced to 22 months with credit for 323 days served. Clinton appeals.

D E C I S I O N

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). 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 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. *Windish*, 590 N.W.2d at 315. 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).

As an initial matter, the parties dispute whether the length of delay should be measured from July 5, 2007, the date on which Clinton demanded a speedy trial after the state first charged him, or from November 13, 2007, the date on which Clinton demanded

a speedy trial after the state recharged him. The caselaw supports calculating the delay from the earlier date. "[I]f charges are dismissed by the prosecutor and new charges are brought, the time period should not start again from zero with the new complaint." *State v. Kasper*, 411 N.W.2d 182, 184 (Minn. 1987); *see also State v. Miller*, 525 N.W.2d 576, 580, n.1 (Minn. App. 1994) ("If dismissal by the prosecutor were to operate so as to begin the time running anew upon a subsequent charge of the same offense, this 'would open a way for the complete evasion' of the speedy trial guarantee.") (*quoting II ABA Standards for Criminal Justice* 12-2.3(f) (2d ed. Supp. 1986)). However, the speedy-trial clock was not running during the week between the state's dismissal and its recharge. *See In re Welfare of G.D.*, 473 N.W.2d 878, 882 (Minn. App. 1991) (noting that the Sixth Amendment right to a speedy trial "has no application after the Government, acting in good faith, formally drops charges") (quoting *United States v. MacDonald*, 456 U.S. 1, 7-9, 102 S. Ct. 1497, 1501-02 (1982)).

Under *Kasper*, the delay at issue here is approximately eight months, which represents the aggregate length of time between Clinton's first demand on July 5, 2007 and dismissal on August 28, 2007 and between Clinton's second demand on November 13, 2007 and his trial on May 14, 2008. 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. This factor weighs in Clinton'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. Although deliberate attempts to delay the trial are weighted "heavily" against the state, more "neutral" reasons for delay, such as negligence or overcrowded courts, are accorded less weight. *Id.*

There is no indication in the record that the period between Clinton's first demand on July 5, 2007 and the state's dismissal on August 28 was attributable to anything other than the normal time required for preparation for trial. As for the period between Clinton's second demand on November 13, 2007 and the hearing on March 31, 2008, the delay was attributable to (1) the prosecutor's decision to dismiss the charges and recharge Clinton after the district court denied the motion to amend the complaint and (2) congestion in the district court's calendar. The district court indicated at the March 10, 2008 hearing that Clinton's trial had been delayed because he was not in custody and preference had to be given to defendants in custody who had made speedy-trial demands. The delay between March 31 and the trial on May 14, 2008 was attributable to defense counsel's unavailability for trial on March 31.

None of the reasons for delay weigh "heavily" against the state. *Id.* The bulk of the delay was attributable to congestion in the district court's calendar. Although overcrowding in the court system is "not a valid reason for denying a defendant a speedy trial," *Windish*, 590 N.W.2d at 316, overcrowding "weighs less heavily against the state than would deliberate attempts to delay trial." *Friberg*, 435 N.W.2d at 513; *cf. State v.*

Griffin, 760 N.W.2d 336, 340 (Minn. App. 2009) (holding that congestion in court calendar with no showing of exceptional circumstances to justify delay weighed in defendant's favor). There is no evidence that the prosecution in this case deliberately attempted to delay the trial. If the district court had granted the prosecutor's motion to amend the original charge, there likely would have been no delay.

Furthermore, the supreme court has tolerated much longer delays attributable to strategic decisions made by the prosecution. *See State v. Helenbolt*, 334 N.W.2d 400, 405-06 (Minn. 1983) (holding that 14-month delay caused by state's pre-trial appeal did not violate right to speedy trial); *State v. Corarito*, 268 N.W.2d 79, 80 (Minn. 1978) (holding that six-month delay did not violate right to speedy trial where continuances granted to prosecutor were for legitimate reasons). Furthermore, this court has held that a 23-month delay attributable to district court administration, although "unusually long," did not weigh against the state because "the prosecution did not act in bad faith to delay the proceeding." *Cham*, 680 N.W.2d at 125.

In light of the supreme court's tolerance for some administrative delay and the lack of any evidence of deliberate efforts to delay the trial by the prosecution, we conclude that this factor weighs slightly in Clinton's favor.

C. Assertion of Speedy Trial Right

"The demand for a speedy trial may be made orally or in writing, but it 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).

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.

In this case, Clinton asserted his right to a speedy trial in writing on two occasions. When the prosecution stated at the March 10, 2008 hearing that Clinton had waived his right to a speedy trial, Clinton personally interjected and said, "I never waived no demand." But Clinton never moved to dismiss the claims against him. *See Windish*, 590 N.W.2d at 318 (holding that third factor weighed only "slightly" in defendant's favor even though defendant made and renewed speedy-trial demand and "made a series of motions to dismiss the case"). Clinton's assertion of his right to a speedy trial is less forceful than it would have been had he requested dismissal based on the alleged speedy trial violation. Consequently, this factor weighs only slightly in Clinton's favor.

D. Prejudice

The fourth factor, prejudice, 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.*

With respect to the first interest, Clinton argues that the delay resulted in the kind of lengthy pretrial incarceration that the right to a speedy trial is supposed to prevent. Clinton was incarcerated for a total of 98 days out of 314 days during which charges were

pending against him.[1] Notably, 31 of the 98 days of incarceration were attributable to Clinton violating the conditions of his release. Precedent indicates that Clinton's 98-day period of incarceration was not prejudicial. *See State v. Givens*, 356 N.W.2d 58, 62 (Minn. App. 1984) (holding that five months in county jail was not prejudicial), *review denied* (Minn. Jan. 2, 1985).

With respect to the second interest, Clinton argues that the delay increased his anxiety and concern because he "wanted to face the charge against him sooner, rather than later." However, Clinton has not pointed to any "particularized evidence of . . . anxiety or concern beyond that typically experienced by a defendant in a criminal proceeding." *State v. Williams*, 757 N.W.2d 504, 514 (Minn. App. 2008), *aff'd*, __ N.W.2d __ (Minn. Sept. 3, 2009).

With respect to the third and most important interest, Clinton concedes that the delay posed no prejudice to his defense because the state's evidence against him, which included a videotape of the sale, was "strong," and because he did not raise an affirmative defense, offer any evidence, or call any witnesses at trial. And there is merit to the state's contention that the delay actually enhanced Clinton's defense because it allowed him to claim that the police officers could not accurately remember what had happened a year earlier when they had dealt with many other similar cases.

Clinton argues that his case is analogous to *Griffin*, where we held that a defendant who had been placed on standby status for eight months while awaiting trial had been

[1] Clinton was incarcerated for 65 days from June 25, 2007 to August 28, 2007, for one day on September 21, 2007, and for 32 days from February 29, 2008 to March 31, 2008.

prejudiced. 760 N.W.2d at 338-39, 341. But the prejudice posed to the defendant in that case was far more severe than the prejudice posed in this case. Griffin was a resident of Chicago, and she was prevented from returning to her home during the first six months of the delay. *Id.* at 341. Furthermore, her freedom was "severely restricted" because during the delay, her case was continued approximately 30 times. *Id.* By contrast, Clinton was not prevented from returning to his home, and his case was continued only three times.

In sum, Clinton has not demonstrated that he was prejudiced by the delay of his trial. *See Barker*, 407 U.S. at 532, 92 S. Ct. at 2193. Thus, this factor does not weigh in Clinton's favor.

E. Summary

Of the four factors, only one weighs heavily in Clinton's favor, the length of the delay. But as discussed earlier, caselaw indicates that Minnesota's appellate courts have determined that much longer delays did not violate the right to speedy trial. And Clinton fails to establish that he was prejudiced by the delay. The *Barker* factors have no "talismanic qualities"; courts must engage in a "difficult and sensitive balancing process" when analyzing an alleged violation of the constitutional right to speedy trial. *Barker*, 407 U.S. at 533, 92 S. Ct. at 2193. Having balanced the factors, we hold that Clinton's right to a speedy trial was not violated.

In addition to its argument that Clinton's right to a speedy trial was not violated, the state argues that Clinton waived his right to raise a speedy-trial claim on appeal by failing to move for dismissal on that ground in district court. The supreme court has suggested that failure to move for dismissal at the time the case is called for trial may

"constitute a waiver of a defendant's right to a speedy trial." *State v. Walter*, 289 Minn. 309, 312, 184 N.W.2d 426, 429 (1971). However, no Minnesota appellate court has expressly required a defendant to move for dismissal in district court to preserve a speedy-trial claim on appeal. In light of our resolution of Clinton's speedy-trial claim in the state's favor, it is not necessary to analyze the state's waiver argument.

Affirmed.

Dated: _____

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The Honorable Michelle A. Larkin