STATE OF MINNESOTA
IN COURT OF APPEALS
A10-55

State of Minnesota,
Respondent,

vs.

Sherrod Colbert,
Appellant.

Filed January 11, 2011
Reversed
Stauber, Judge

Hennepin County District Court
File No. 27CR07118525

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

Michael O. Freeman, Hennepin County Attorney, Paul R. Scoggin, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Larkin, Judge; and Stauber, Judge.

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

STAUBER, Judge

On appeal from his convictions of simple robbery and first-degree aggravated robbery, appellant Sherrod Colbert claims that his convictions must be vacated because

he was denied his constitutional right to a speedy trial. He also claims that the district court committed reversible error by admitting Spreigl evidence of appellant's prior bad acts and by adjudicating and sentencing appellant on both offenses because simple robbery is a lesser-included offense of first-degree aggravated robbery. Because we conclude that appellant's speedy-trial right was violated, we reverse on this ground without addressing the other claims of error.

FACTS

Appellant was convicted of simple robbery and first-degree aggravated robbery stemming from an incident that occurred in the early morning hours of October 16, 2007. On that date, robbery victim C.W. had been drinking at a bar in downtown Minneapolis. When the bar closed at 2:00 a.m., appellant approached C.W. outside the bar and struck up a conversation. Appellant invited C.W. to his house to have another drink, and C.W. accepted. The two men took a cab to a residence that C.W. believed was appellant's home. When they arrived, it became clear to C.W. that appellant did not have any alcohol. Appellant instead invited C.W. to smoke crack cocaine with him. When C.W. declined, appellant grabbed him and rifled through his pockets. Appellant took money and a package of cigarettes before C.W. broke away and ran out the front door. Appellant followed C.W., punched him in the eye, knocked him to the ground, and then stole C.W.'s wrist-watch before going back inside the house. C.W. remained outside the house screaming until a neighbor called the police. The responding officers arrived and arrested appellant inside the house. C.W. identified appellant as the assailant, and the officers recovered C.W.'s watch, cigarettes, and $16 cash from appellant.

Appellant was arrested on October 16, 2007. His jury trial did not commence until August 5, 2009, 659 days or nearly 22 months later. On November 7, 2007, an omnibus hearing was held during which appellant made his first demand for a speedy trial. A trial was scheduled for January 7, 2008. This first trial date was continued for one week because the judge and defense counsel were in trial on other matters. The second trial date was scheduled for January 14, 2008, but the state requested a continuance on that date because one of its witnesses, one of the arresting officers, was unavailable due to a medical leave. The court granted the continuance over appellant's objection but released appellant without bail.

The third trial date was scheduled for March 24, 2008. The trial was not held on that date. According to the register of actions, appellant did not appear because he was in custody in Ramsey County. The fourth trial date was scheduled for April 10, 2008, but the trial once again was not held. The register of actions shows that appellant was still in custody at this time. No transcript exists from either of these dates. However, a transcript from April 13, 2009 indicates that the state was also not ready to proceed on either March 23, 2008, or April 10, 2008, because its witness was still unavailable.

The fifth trial date was scheduled for September 8, 2008. On that date, defense counsel requested a competency evaluation pursuant to Minn. R. Crim. P. 20.01. Appellant personally objected to the competency evaluation, telling the court he was competent and that he did not want his trial to be further delayed. The district court ordered the evaluation and a status hearing was held on October 20, 2008. At the October 20 hearing, appellant once again asserted his right to a speedy trial and the sixth

trial date was scheduled for January 20, 2009. At the October 20 hearing, appellant once again asserted his right to a speedy trial and appellant personally questioned the court about its failure to honor his demands for a speedy trial. The hearing contained this exchange:

> THE COURT: . . . The record is clear that you want a speedy trial and we are doing the best we can. . . .
> DEFENDANT: So I'm not eligible to have a speedy trial from the date that I was arrested, sir?
> THE COURT: Not the way things have worked out.

Appellant's January 20 trial date was continued because of the unavailability of the state's police witnesses; the two arresting officers were in Washington D.C. on a security detail for the presidential inauguration. The court denied appellant's motion to dismiss for violation of his right to a speedy trial.

The seventh trial date was then scheduled for April 13, 2009. The district court was unable to proceed with trial on this date due to a full calendar, and appellant again moved to dismiss for violation of his right to a speedy trial. The court denied the motion, but noted "for the record that there are to be no more continuances in this case." The eighth trial date was scheduled for May 27, 2009. The trial was not held on this date. The register of actions reveals that a hearing was held, but it was not conducted on the record. Neither party requested a continuance, and thus the delay seems to have been necessitated by the court's calendar. Appellant's trial finally commenced on August 5, 2009. The jury reached a verdict of guilty on both counts on August 10, 2009, and the district court imposed sentence on both counts.

On appeal, appellant argues that he was denied his constitutional right to a speedy trial, that the district court erred by admitting evidence of his prior bad acts, and that the district court erred by sentencing him on both counts because simple robbery is a lesser-included offense of first-degree aggravated robbery.

D E C I S I O N

I.

The United States and Minnesota Constitutions guarantee a criminal defendant the right to a speedy trial. U.S. Const. amend. VI; Minn. Const. art. I, § 6. The right to a speedy trial is a constitutional question that is reviewed de novo. *State v. Griffin*, 760 N.W.2d 336, 339 (Minn. App. 2009). In determining whether an accused has been deprived of the right to a speedy trial, Minnesota courts have adopted the four-factor balancing test announced by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182 (1972). *State v. Widell*, 258 N.W.2d 795, 796 (Minn. 1977). The four 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. *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999). No one factor is necessary to or dispositive of a determination that a defendant was denied the right to a speedy trial; the factors must be considered together in light of the relevant circumstances. *Id.*

A. Length of Delay

In Minnesota, following a speedy-trial demand, the trial shall commence within 60 days of the demand unless good cause is shown. Minn. R. Crim. P. 11.10. Delay beyond

the 60-day period raises a presumption that a defendant's speedy-trial right has been violated and requires further inquiry into whether a violation occurred. *Windish*, 590 N.W.2d at 315; *State v. Friberg*, 435 N.W.2d 509, 513 (Minn. 1989). The length of delay is measured from the date the right to a speedy trial attaches, in this case, when appellant was arrested on October 16, 2007. *See State v. Jones*, 392 N.W.2d 224, 235 (Minn. 1986) (stating that a speedy-trial right attaches when an indictment or complaint is issued against a defendant or when he is arrested and held to answer to a criminal charge). Appellant's trial did not begin until August 5, 2009, which was 659 days or nearly 22 months after his arrest. This delay raises the presumption that a violation has occurred and we therefore analyze the remaining *Barker* factors.

B. Reason for Delay

The responsibility for promptly bringing a case to trial rests with the state. *Barker*, 407 U.S. at 529, 92 S. Ct. at 2191. Though the state has the primary burden of ensuring a speedy trial, delays are assigned different weights in assessing whether a defendant's speedy-trial right has been violated. *Id.* at 531, 92 S. Ct. at 2192; *State v. Cham*, 680 N.W.2d 121, 125 (Minn. App. 2004), *review denied* (Minn. July 20, 2004). Deliberate attempts at delay weigh heavily against the state. *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192. "[N]egligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Id.*

Here, appellant does not allege, nor does the record indicate, that any of the delays were attributable to a deliberate attempt by the state to hamper appellant's defense.

Accordingly, the delays do not weigh as heavily against the state. But the initial delays were caused by the unavailability of a state witness due to a medical leave. While these delays appear to be in good faith and do not weigh as heavily against the state, they still must weigh against the state because the state bears the ultimate responsibility for promptly bringing an accused to trial.

The record indicates that state was unable to proceed with trial on January 14, March 14, and April 10, 2008, because its witness was unavailable. Respondent argues that appellant himself was unavailable on March 14 and April 10 because he was in custody in Ramsey County and thus, these delays cannot be weighed against the state because they were due to appellant's own actions. However, the cases cited by respondent involve scenarios in which the defendant was directly responsible for the delay, including delays due to excessive defense motions or the defendants' fugitive status, and are not analogous to the facts here. We do not agree that appellant's confinement in Ramsey County, only a few miles from the location of his trial in Hennepin County, is good cause for the delay. We further cannot agree with respondent's good cause for delay argument when the record reveals that the state was still unable to proceed with trial due to the continuing unavailability of its witness. This early period of delay, from January 14 through September 8, was 238 days or nearly 8 months, and was primarily attributable to the state. Also, the state has not explained why it could not proceed to trial with the testimony of the second arresting officer. This delay weighs against the state.

Notwithstanding appellant's personal objection, the delay beginning September 8, when defense counsel requested a competency hearing, cannot weigh against the state. *See State v. Bauer*, 299 N.W.2d 493, 498 (Minn. 1980) (stating that delay caused by incompetency of defendant is normally justified as necessary to protect the defendant's right to a fair trial). However, this delay of 42 days did not constitute a significant part of the overall delay between arrest and trial. After defense counsel requested the competency evaluation, appellant was deemed competent on or before the October 20 status hearing, when he once again asserted his right to a speedy trial. This 42-day delay was attributable to appellant.

Following the October 20 hearing, the trial was next scheduled for January 20, 2009, but was again continued due to unavailability of the state's witnesses. The unavailability of the two officers on this date because of their security detail for the presidential inauguration must weigh against the state. The state had agreed to the trial date months before and knew the trial had already been delayed several times and that appellant had again asserted a speedy trial demand. Accordingly, this delay must weigh against the state.

The final delays, from January 20 until the trial began on August 5, a period of 197 days or more than six months, appears to be primarily due to the court's calendar congestion. After the trial was continued in January, the next trial date was scheduled for April 13. The trial was continued due to the court's calendar congestion. The trial was next continued until May 27, in spite of the fact that the district court judge had noted for the record that there were to be no more continuances. The trial was finally held in

August. "[O]vercrowding in the court system is not a valid reason for denying a defendant a speedy trial." *Windish*, 590 N.W.2d at 316. "The responsibility for an overburdened judicial system cannot, after all, rest with the defendant." *Jones*, 392 N.W.2d at 235. Accordingly, these delays must weigh against the state.

C. Assertion of Right

A defendant's assertion of the right to a speedy trial need not be formal or technical, and it is determined by the circumstances. *Id.* at 317. A court must assess "the frequency and intensity of a defendant's assertion of a speedy trial demand—including the import of defense decisions to seek delays." *Id.* at 318. While there is no requirement that a defendant continue to reassert the demand, this court considers the frequency and force of the speedy-trial demand because "the strength of the demand is likely to reflect the seriousness and extent of the prejudice." *Friberg*, 435 N.W.2d at 515 (citing *Barker*, 407 U.S. at 529, 531, 92 S. Ct. at 2191-92).

It is undisputed that appellant made a speedy-trial demand at his initial appearance on November 7, 2007. The record also shows that appellant continued to assert this right on September 8, 2008, October 20, 2008, and on January 20, 2009, even though he was no longer in custody. Further, appellant moved to dismiss the case for a speedy-trial violation on January 20, 2009, and again on April 13, 2009. Appellant's continuing unequivocal demands for a speedy trial weigh strongly in favor of finding a speedy-trial violation.

D. Prejudice

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. The interests that must be considered are: (1) preventing oppressive pretrial incarceration; (2) minimizing the accused's anxiety and concern; and (3) limiting the possibility that the defense will be impaired. *Windish*, 590 N.W.2d at 318. The third interest, possible impairment of a defendant's defense, is the most important. *Id.*

Appellant has not shown how the delay hampered his ability to present his defense. However, a defendant is not required to prove specific prejudice. *Id.* The Supreme Court has stated that

> we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify. While such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria, it is part of the mix of relevant facts, and its importance increases with the length of delay.

Doggett v. United States, 505 U.S. 647, 655-56, 112 S. Ct. 2686, 2693 (1992) (citation omitted). Accordingly, although appellant has not shown any specific prejudice to his defense, we recognize that the 22-month delay in this case presumably compromised the reliability of his trial.

Further, "prejudice to a defendant caused by delay in bringing him to trial is not confined to the possible prejudice to his defense in those proceedings." *Moore v. Arizona*, 414 U.S. 25, 26-27, 94 S. Ct. 188, 190 (1973).

> Inordinate delay, wholly aside from possible prejudice to a defense on the merits, may seriously interfere with the defendant's liberty, whether he is free on bail or not, and . . . may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and friends. These factors are more serious for some than for others, but they are inevitably present in every case to some extent.

Id. at 27, 94 S. Ct. at 190 (quotations omitted). Although appellant was released from custody in January 2008, we recognize that appellant was forced to appear in court multiple times ready to proceed with trial, and that he continued to have these charges hanging over his head until his trial in August 2009. Such a prolonged period of uncertainty, which necessarily raises the potential for increased anxiety and concern, is one of the things that the speedy trial right is designed to prevent.

In light of all the *Barker* factors, we conclude that appellant was deprived of his right to a speedy trial. The length of the delay alone, 659 days or almost 22 months, weighs heavily in favor of appellant. This court has found speedy-trial violations in cases where the delays were much shorter. *See Griffin*, 760 N.W.2d at 337 (eight month delay attributable solely to court congestion).[1] And of the many delays, only the 42 days necessary to complete the competency evaluation can be fairly attributable to appellant.

[1] In several unpublished opinions, this court has also found speedy-trial violations where delays were shorter. *See State v. Faulkner*, No. A07-1877, 2009 WL 510807, at *8 (Minn. App. Mar. 3, 2009) (seven-and-a-half-month delay), *review denied* (Minn. May 27, 2009); *State v. Nesgoda*, No. A05-619, 2006 WL 44332, at *3 (Minn. App. Jan. 10, 2006) (eight-month delay), *review denied* (Minn. Mar. 28, 2006; *State v. Christensen*, No. C7-02-909, 2003 WL 1701893, at *3 (Minn. App. Apr. 1, 2003) (six-month delay). Unpublished opinions of this court are not precedential; however they may have persuasive value. *Andrew L. Youngquist, Inc. v. Cincinnati Ins. Co.*, 625 N.W.2d 178, 184 (Minn. App. 2001).

The balance of the delays are attributable to state witness unavailability, the court system scheduling, overcrowded calendars, and unspecified judicial administrative delays. Additionally, appellant vigorously asserted his right to a speedy trial throughout the delay. The only factor not weighing strongly in appellant's favor is prejudice. But given the excessive delay in this case, there is a strong presumption that appellant was prejudiced. *See Doggett*, 505 U.S. at 652, 112 S. Ct. at 2691 (stating that "the presumption that pretrial delay has prejudiced the accused intensifies over time"). Moreover, a showing of prejudice is not a prerequisite to a finding of a speedy-trial violation, as none of the *Barker* factors is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." *Barker*, 407 U.S. at 533, 92 S.Ct. at 2193. "It is undeniable that prejudice flows from any deprivation of a constitutional right." *Griffin*, 760 N.W.2d at 341.

We conclude that appellant's constitutional right to a speedy trial was violated and therefore reverse his convictions. In reaching this conclusion, we are mindful of the fact that some of the delays in this case likely were an undesirable consequence of the budgetary constraints on our judicial system. While this is unfortunate, a criminal defendant remains entitled to the constitutional right to a speedy trial. While the burden is ultimately on the state to expeditiously bring an accused to trial, judicial oversight must also protect this right.

II.

Appellant also argues that the district court abused its discretion by admitting Spreigl evidence of his prior bad acts, which included a 1995 conviction for theft from a

person and a 2000 conviction for simple robbery, and that the court erred by adjudicating and sentencing him on both simple robbery and first-degree aggravated robbery when simple robbery is a lesser-included offense. Because we reverse appellant's convictions on another ground, we need not address the merits of his additional claims.

Reversed.