STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0709

State of Minnesota,
Respondent,

vs.

Daniel Lee Nyssen,
Appellant.

Filed May 27, 2008
Affirmed
Schellhas, Judge

Nicollet County District Court
File No. 52Cr-06-79

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

Michael K. Riley, Sr., Nicollet County Attorney, Kristen E. Swanson, Kenneth R. White, Assistant County Attorneys, 326 South Minnesota Avenue, P.O. Box 360, St. Peter, MN 56082 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Michael F. Cromett, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Schellhas, Presiding Judge; Klaphake, Judge; and Halbrooks, Judge.

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

SCHELLHAS, Judge

Appellant challenges his conviction for driving after cancellation as inimical to public safety, arguing that his right to a speedy trial was violated. We find no violation and affirm.

FACTS

On February 8, 2006, appellant Daniel Lee Nyssen was arraigned in the Nicollet County Courthouse on a number of misdemeanor charges, including fourth-degree driving while impaired (DWI) that occurred on November 21, 2005. Two deputy sheriffs observed appellant driving away from the courthouse. As a result, appellant was charged with gross misdemeanor driving after cancellation as inimical to public safety (DAC-IPS) in violation of Minn. Stat. § 171.24, subd. 5 (2006). The DAC-IPS case was set for a first appearance on March 7, the same day as the pretrial set in the DWI case. At the March 7 hearing, appellant's counsel waived the 28-day omnibus hearing. At the next hearing on April 18, appellant, appearing with counsel, entered a plea of not guilty to the DAC-IPS charge; both parties agreed that the DAC-IPS case would track the DWI case; both parties requested that the cases be set for jury trial; and appellant's counsel indicated on the record that appellant was not requesting a speedy trial. Both parties agreed to schedule the DWI trial before the DAC-IPS trial because the alleged DWI offense was first in time.

At the April 18 hearing, while the district court was suggesting trial dates for both cases, appellant's counsel requested that the DAC-IPS case be set further out. The court

offered May 12, 2006 as a date-certain trial date for the DWI case, and appellant's counsel also asked that it be set further out in part because "he's not making a request for speedy trial," and in part because of defense counsel's schedule and the possibility that a new public defender would be assigned to the case. The court then set a "back-up date" in the DWI case for May 31, 2006, with a date certain of June 21, 2006, and in the DAC-IPS case, proposed a "back-up date" of June 8, 2006, with a date certain of June 23, 2006. Appellant's counsel again asked that the DAC-IPS trial be scheduled further out, stating, "I would ask that it be set later than June 23rd because . . . it seems the matters are being set very close for date certains." The court granted appellant's request, setting the DAC-IPS trial for July 21, 2006.

Although the parties agree on appeal that appellant made a demand for a speedy trial on May 26, 2006, their agreement is perplexing. The May 26 hearing transcript reveals neither the case (DWI or DAC-IPS) to which the speedy-trial discussion pertained nor a clear demand for a speedy trial in either case. On May 26, the district court began the hearing by noting that both cases were before the court for pretrial. Appellant's counsel advised the court that appellant might want to proceed pro se, noting that appellant was unhappy with his representation because, among other reasons, appellant had thought that a speedy trial had been requested. Appellant's counsel did not indicate in which case appellant thought there was a speedy-trial demand. Appellant then addressed the court directly and stated that he would like to keep his attorney. Later in the hearing, the court addressed appellant's speedy-trial rights without specifying to which case it was referring. The court explained that where pretrial issues are raised and

the court is to decide those issues, the 60-day speedy-trial period is tolled while the court takes the pretrial motions under advisement. The court also explained to appellant that the court was allowed 90 days within which to consider the pretrial motions. Appellant did not object to the explanation and in fact responded, "I understand."

Several delays then took place in the DWI proceeding due in part to appellant's pretrial motions. After the district court resolved the pretrial motions in the DWI case, appellant indicated again that he wanted to have jury trials in both cases in chronological order according to the date of the alleged offenses. The court set November 3, 2006, as a "back-up date" for trial in the DWI case and January 12, 2007, as a "backup date" for trial in the DAC-IPS case with a date certain of January 26. Appellant was found guilty by a jury in the DWI case[1] and was subsequently found guilty of DAC-IPS after a court trial that occurred on January 26. Appellant was sentenced on February 5, 2007. He now appeals his DAC-IPS conviction.

D E C I S I O N

A speedy-trial challenge presents a constitutional question subject to de novo review. *State v. Cham*, 680 N.W.2d 121, 124 (Minn. App. 2004), *review denied* (Minn. July 20, 2004).

"The right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 6 of the Minnesota Constitution." *State v.*

[1] Appellant challenged his DWI conviction in part on speedy-trial grounds. His speedy-trial challenge was rejected and his conviction was affirmed by this court. *State v. Nyssen*, No. A07-0323, 2008 WL 467434, at *2-*3 (Minn. App. Feb. 12, 2008), *review denied* (Minn. Mar. 18, 2008).

DeRosier, 695 N.W.2d 97, 108 (Minn. 2005). The Supreme Court has set forth four factors to consider when determining if the right to a speedy trial has been violated: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192 (1972); *see also State v. Widell*, 258 N.W.2d 795, 796 (Minn. 1977) (adopting the *Barker* inquiry).

In this case, the parties agree that appellant demanded a speedy trial on May 26, 2006. Appellant claims that his right to a speedy trial was violated by the delay between his demand and January 26, 2007, the date of his court trial on the DAC-IPS charge. The only delay alleged by appellant was caused solely by the delay in the DWI case. Because this court previously considered appellant's alleged speedy-trial violation in the DWI case, *Nyssen*, 2008 WL 467434, at *2-*3, our review of appellant's alleged speedy-trial violation in this case necessarily involves the same analysis performed in the DWI appeal.

1. Length of Delay

"The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker*, 407 U.S. at 530, 92 S. Ct. at 2192. Where a demand for speedy trial is made, "[b]y rule in Minnesota, trial is to commence within 60 days from the date of the demand unless good cause is shown . . . why the defendant should not be brought to trial within that period." *DeRosier*, 695 N.W.2d at 108-09 (citing Minn. R. Crim. P. 6.06, 11.10). Delay beyond 60 days from a demand for

speedy trial is presumptively prejudicial and triggers consideration of the remaining *Barker* factors. *State v. Friberg*, 435 N.W.2d 509, 513 (Minn. 1989). In this case, there was a delay of more than 60 days; accordingly, there was a presumptively prejudicial delay in this case that triggers consideration of the remaining *Barker* factors.

2. Reason for the Delay

As previously noted, the delay in the DAC-IPS case was caused solely by the delay in the DWI case. Because the tracking of appellant's DAC-IPS case with his DWI case was agreed to and desired by appellant, the reason for the delay in his DAC-IPS case weighs against him. The reasons for the delay in the DWI case have already been considered by this court when it rejected appellant's speedy-trial challenge in the DWI file, *Nyssen*, 2008 WL 467434, at *3, and will not be reconsidered in this appeal.

3. Whether Appellant Asserted Right to Speedy Trial

While "defendants are not required to continuously reassert their demand," "the frequency and force of a demand must be considered when weighing this factor." *Friberg*, 435 N.W.2d at 515 (citing *Barker*, 407 U.S. at 529, 531, 92 S. Ct. at 2191-92). Assertion of a speedy-trial right "need not be formal or technical." *State v. Windish*, 590 N.W.2d 311, 317-18 (Minn. 1999). The supreme court has looked for "any action whatever . . . that could be construed as the assertion of the speedy trial right." *Id.* (quotation omitted).

Even after delays caused by a defendant, repeated assertions of the right to a speedy trial weigh in favor of a defendant in a speedy-trial claim. *Windish*, 590 N.W.2d at 318. In *Windish*, the defendant's assertions of his right to a speedy trial weighed in his

favor where, after he obtained a continuance to try a different criminal matter first, the defendant expressly reasserted his demand for a speedy trial. *Id.* In *State, City of Oakdale v. Curtis*, 393 N.W.2d 10, 12 (Minn. App. 1986), a defendant's assertion of his speedy-trial right weighed against him where he asserted it once, did not object when his trial date was scheduled, and then never reasserted his demand.

In the DAC-IPS case, the only demand for a speedy trial was made by appellant on May 26, 2006. After this demand, appellant requested and agreed to tracking the case with his DWI case. Subsequent to May 26, appellant acknowledged multiple times on the record that his pretrial challenges in the DWI case would delay the DWI trial and, accordingly, the DAC-IPS trial. Like the defendant in *Curtis*, appellant asserted the right once, did not object to the scheduling in this case, and did not reassert his speedy-trial right in this case. This factor therefore weighs against him.

4. Whether Delay Prejudiced Appellant

"The final prong of the *Barker* test is to determine whether [a defendant] suffered prejudice as a result of the delays." *Windish*, 590 N.W.2d at 318. In considering prejudice to a defendant, three interests protected by the right to a speedy trial are considered: "(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*. (citing *Barker*, 407 U.S. at 532, 92 S. Ct. 2193). But, without other forms of prejudice, the general anxiety of awaiting trial is, by itself, insufficient to establish prejudice. *State v. Reese*, 446 N.W.2d 173, 179 (Minn. App. 1989), *review denied* (Minn. Nov. 15, 1989).

In the appeal of appellant's DWI conviction, we stated that appellant claimed, and the record reflected, no specific prejudice and we noted that appellant was not in jail, no witnesses had left the area, and no evidence had become stale. *Nyssen*, 2008 WL 467343, at *3. We concluded that no prejudice was shown "other than the anxiety one would have in facing charges." *Id.* Because no specific prejudice was claimed or apparent, we determined that this factor weighed against appellant. *Id.* In this case, based on the same circumstances and the same authority, this factor therefore weighs against appellant.

Because the factors of reason for delay, assertion of the right to a speedy trial, and prejudice to appellant weigh against him, we conclude that appellant's right to a speedy trial was not violated.

Affirmed.