STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2252

State of Minnesota,
Respondent,

vs.

Christopher H. Mathwig,
Appellant.

Filed February 17, 2009
Affirmed
Lansing, Judge
Dissenting, Klaphake, Judge

Nicollet County District Court
File No. CR-07-65

Lori Swanson, Attorney General, Paul R. Kempainen, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Michael K. Riley Sr., Nicollet County Attorney, 326 South Minnesota Avenue, P.O. Box 360, St. Peter, MN 56082-0360 (for respondent)

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

Considered and decided by Klaphake, Presiding Judge; Lansing, Judge; and Huspeni, Judge.*

*Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

LANSING, Judge

A jury found Christopher Mathwig guilty of conspiracy to commit second-degree, controlled-substance crime. In this appeal from conviction he argues that he was denied his right to a speedy trial and that a police officer's testimonial reference to a prior drug-related conversation between Mathwig and a confidential informant violated his right to a fair trial. Because the prosecutor's decision to dismiss and recharge rather than to obtain a continuance, although disfavored, did not deprive Mathwig of his constitutional right to a speedy trial, and because the district court's decision not to intercede during the police officer's testimony is not plain error, we affirm.

F A C T S

Christopher Mathwig was charged on January 5, 2007, with conspiracy to commit second-degree, controlled-substance crime in violation of Minn. Stat. § 152.096, subd. 1 (2006), and Minn. Stat. § 152.022, subd. 1(1) (2006). Mathwig pleaded not guilty and demanded a speedy trial at a hearing on February 5, 2007. The district court scheduled trial for March 8-9, 2007.

As trial approached, the prosecutor contacted Mathwig's attorney to ask if he would object to a continuance; Mathwig's attorney said he would. The prosecutor did not pursue the continuance, but, on February 28, 2007, he dismissed the charge "without prejudice for additional investigation." The presiding judge was on vacation from February 26 until March 2, 2007, and signed the dismissal order releasing Mathwig from custody on March 5, 2007.

The state filed a second complaint against Mathwig on March 14, 2007, charging the same crime as the first complaint: conspiracy to commit second-degree, controlled-substance crime. At a court appearance on April 9, 2007, Mathwig requested an omnibus hearing on the refiled charge to argue for dismissal on the ground that dismissing and recharging violated his right to a speedy trial on the offense. The prosecutor submitted an affidavit setting forth his reasons for the dismissal—an absent lab report, eleventh-hour disclosure of a defense witness, problems in answering discovery requests for information not within the prosecutor's control, and unfinished negotiations with a witness who was important to the state's case.

The district court directly questioned the prosecutor about his decision to dismiss the charge rather than seek a continuance. The prosecutor explained that he thought it would be a waste of the district court's time to request a continuance when the prosecutor would not be able to tell the court exactly when he would be ready for trial.

Following the omnibus hearing, the district court issued an order denying Mathwig's motion to dismiss the recharged offense. In the memorandum accompanying the order, the district court stated that it accepted most of the prosecutor's explanation of the reasons for the dismissal and also stated that it did not believe that the prosecutor was acting in bad faith or impermissibly maneuvering to deprive Mathwig of a speedy trial. The district court nonetheless noted that the preferred practice in these circumstances is to request a continuance rather than to dismiss and recharge the offense. The district court also observed that the vacation in the week preceding the trial date may have "played some role in the [s]tate's decision to dismiss rather than to seek a continuance."

To determine whether the pretrial procedures violated Mathwig's speedy-trial rights, the district court evaluated each of the four factors set out in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192 (1972).

Mathwig did not press for a trial date at the April appearance on the recharged offense. At the April 9 omnibus hearing, his attorney explained, "[T]he only way we could have requested a speedy trial is if we would have . . . waived the challenge to the violation of the speedy trial. . . . [A]s soon as there is an omnibus ruling . . . we will of course be making [a request for] a speedy trial." In response, the district court asked, "[W]hat if I were to . . . set up a trial in this for the end of . . . April?" Rather than accepting the district court's offer, Mathwig's attorney responded, "But, even if we have it at the end of April, that's still delaying almost two months, almost a full second [speedy-trial] period."

The district court's omnibus order, which was issued on July 6, 2007, noted that it would "expedite the scheduling of further proceedings . . . including the scheduling of a trial." A pretrial hearing was held 4 days later. At the outset of the pretrial hearing, Mathwig made a speedy-trial demand. The district court suggested the next available date, August 2, 2007. Mathwig's attorney replied, "That would be fine."

The jury trial was held as scheduled on August 2 and 3, and the jury found Mathwig guilty of conspiracy to commit second-degree, controlled-substance crime. The district court imposed a sentence of seventy-eight months. Mathwig appeals from the conviction.

D E C I S I O N

I

Mathwig first argues that the state violated his right to a speedy trial. Both the federal and state constitutions guarantee criminal defendants the right to a speedy trial. U.S. Const. amends. VI, XIV, § 1; Minn. Const. art. I, § 6. In Minnesota, a defendant charged with a felony may demand a speedy trial under Minn. R. Crim. P. 11.10. If a defendant makes a demand, a trial must be commenced within 60 days of the demand unless continued for good cause. *Id.* Whether a delay violates a defendant's constitutional right to a speedy trial is a question of law that we review de novo. *See State v. Wiegand*, 645 N.W.2d 125, 129 (Minn. 2002) (providing that constitutional issues are subject to de novo review).

Minnesota courts generally apply the test set forth in *Barker v. Wingo* to review claims that a defendant was denied his right to a speedy trial. 407 U.S. at 530, 92 S. Ct. at 2192; *State v. DeRosier*, 695 N.W.2d 97, 108-09 (Minn. 2005) (citing and applying *Barker*). The *Barker* test requires a balancing of four factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) whether the delay prejudiced the defendant. 407 U.S. at 530, 92 S. Ct. at 2192. None of the four *Barker* factors is independently necessary or sufficient to conclude that the defendant did not receive a speedy trial. *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999) (quotation omitted). But the length of the delay has been described as a "triggering mechanism": when a trial occurs more than 60 days after a defendant demands a speedy

trial, the length of delay is presumptively prejudicial and triggers consideration of the remaining factors. *State v. Friberg*, 435 N.W.2d 509, 513 (Minn. 1989).

The delay in Mathwig's trial triggers application of the *Barker* balancing test. Whether or not we count the 9 days during which the charge against Mathwig was dismissed, the length of the delay exceeds 60 days. Assuming the days count because the charge was dismissed without prejudice, the delay was 177 days. *Cf. United States v. MacDonald*, 456 U.S. 1, 10, 102 S. Ct. 1497, 1502-03 (1982) (holding that period between dismissal of military charge and indictment on civilian criminal charge did not count under first *Barker* factor). We, therefore, proceed to consideration of the remaining factors: the reason for the delay, the assertion of the right, and prejudice.

The reason-for-delay factor weighs against the state. Under *Barker*, "[a] deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government." 407 U.S. at 531, 92 S. Ct. at 2192. But more neutral reasons "such as negligence or overcrowded courts" are weighted less heavily against the state. *Id.* In this case, the delay directly attributable to the state is the 35-day delay between dismissal of the case on March 5 and Mathwig's April 9 temporary waiver of proceeding to trial. Trial was ultimately held 144 days beyond the original trial date and only 88 of those days are attributable to Mathwig's decision to move for dismissal at the omnibus hearing.

The reason for the state's delay is best summarized as negligence. The prosecutor's affidavit stated that, when he filed his motion to dismiss on February 28, 2007, he had not yet received the BCA lab report on the drugs seized on January 4, 2007,

that he was uncertain whether the BCA lab analysts would be available to testify, that he was not yet able to give Mathwig materials that he had requested from the BCA, that he had not yet reached a plea agreement with a coconspirator he hoped would testify at trial, and that he needed more time to investigate a witness that Mathwig's counsel had disclosed on February 28.

Although negligence ordinarily does not weigh heavily against the state, it weighs more heavily when, as in this case, the prosecutor dismissed and recharged the offense because he did not believe he could obtain a continuance. The continuance procedure plays an important protective role. It sets forth a simple and fair procedure for determining whether "good cause" supports the delay being proposed. Minn. R. Crim. P. 11.10. When a prosecutor effectively fashions his own continuance by unilaterally dismissing and recharging an offense to gain more preparation time, he jeopardizes the defendant's rights.

We recognize that legitimate reasons may arise to justify dismissing and recharging an offense. *See* Minn. R. Crim. P. 30.01 (permitting prosecutor to dismiss without prejudice); *State v. Couture*, 587 N.W.2d 849, 852-53 (Minn. App. 1999) (noting that good-faith reindictment is permitted), *review denied* (Minn. Apr. 20, 1999). Section 3-3.9(a) of the ABA Standards for Criminal Justice (1993) states that a prosecutor should not "institute . . . or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction." But dismissal and recharging should be the rare exception rather than the rule when the evidentiary standard for instituting a criminal charge is the same as the standard for continuing its pendency.

Because the prosecutor dismissed and recharged the offense when he did not believe a continuance would be granted, the state's negligence weighs heavily against it.

The third *Barker* factor—the defendant's assertion of his right—does not fully support Mathwig's argument that his speedy-trial right was violated. In evaluating this factor, we consider "the frequency and force of a demand" because "the strength of the demand is likely to reflect the seriousness and extent of the prejudice which has resulted." *Friberg*, 435 N.W.2d at 515. Mathwig promptly asserted his right on February 5, but he temporarily waived it on April 9 when he sought dismissal of the second complaint. At the omnibus hearing, the district court offered Mathwig a trial date at the end of April, but Mathwig's attorney chose instead to proceed on a pretrial resolution of the speedy-trial issue. Mathwig did not request expedited review of his motion to dismiss, even when it became apparent that it would not be quickly resolved. And when Mathwig finally reasserted his right on July 10, 88 days later, he immediately accepted the August 2 trial date. These undisputed facts show that Mathwig's demand for trial was not strong or forceful.

Finally, under the fourth *Barker* factor, we evaluate whether the delay prejudiced the defendant. Three underlying policies govern this evaluation: preventing oppressive pretrial incarceration, minimizing the anxiety of the accused, and limiting impairment of the defense. *Windish*, 590 N.W.2d at 318. The final policy consideration is the most important. *Id.* Mathwig asserts that he was prejudiced because he suffered anxiety over the uncertainty of the outcome of his trial. But he has not identified any ways in which he has suffered more than the usual "stress, anxiety[,] and inconvenience experienced by

anyone who is involved in a trial." *Friberg*, 435 N.W.2d at 515. He also fails to demonstrate any likely harm to his case. *See Windish*, 590 N.W.2d at 318-19 (recognizing that impairment of defense is difficult to prove and that defendant need only show likely harm to case). Consequently, the record shows that the delay did not prejudice Mathwig.

Under these circumstances, the state did not deprive Mathwig of his right to a speedy trial. Mathwig's trial began 177 days after his demand, and the reason for the delay weighs heavily in Mathwig's favor. But Mathwig was responsible for the 88-day delay between April 9 and July 6, he did not forcefully demand a trial, and he suffered no prejudice. A balancing of the *Barker* factors shows that Mathwig's speedy-trial right was vindicated. *Cf. State v. Richards*, 456 N.W.2d 260, 266 (Minn. 1990) (concluding that speedy-trial right was not violated under *Barker* when much of twenty-five-month delay was attributable to defendant and defendant did not show prejudice).

Mathwig contends that his conviction must be reversed on speedy-trial grounds because his case is indistinguishable from *State v. Kasper*, 411 N.W.2d 182 (Minn. 1987). We disagree. In *Kasper*, the supreme court ruled that the defendant's speedy-trial right was violated when, after the state tab-charged the defendant for an alcohol-related misdemeanor driving offense and was specifically denied a trial continuance, the prosecutor dismissed the tab charges and filed a formal complaint on the same day. *Id*. at 185.

The prosecutor in *Kasper* defied the finality of the district court's order denying a trial continuance by manipulating the formal-complaint procedure—a procedure that is

designed for the benefit of the defendant. *See* Minn. R. Crim. P. 4.02, subd. 5(3) (providing that, in misdemeanor cases that have been tab-charged, defendant or defense attorney may demand sworn complaint setting forth charges). Thus, the prosecutor's actions in *Kasper* were not only aimed at restarting the speedy-trial clock, they were also calculated to reverse the district court's denial of the continuance. 411 N.W.2d at 185. Instead of properly challenging the denial through appeal, the prosecutor sought improperly to regain jurisdiction over the defendant through issuance of a formal complaint—a process not available to the prosecutor for those purposes. *See id.* (referring to prosecutor's action as "legal maneuvering"). Appeal was available to the prosecutor because the denial of the continuance order "ended it[s] case." *Id.*

To prevent improper manipulation of the state's general power to recharge, the *Kasper* court adopted a rule set forth in ABA Standards for Criminal Justice § 12-2.3(f) (1986), holding that, "if charges are dismissed by the prosecutor and new charges are brought, the time period should not start again from zero with the new complaint." *Kasper*, 411 N.W.2d at 184. The comment to § 12-2.3(f) notes, "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." (Quotation omitted.)

Mathwig's circumstances differ in two significant ways. First, the record does not establish that the prosecutor in Mathwig's case dismissed and recharged because he wanted to manipulate the speedy-trial clock. The prosecutor dismissed the charge only 23 days after Mathwig's speedy-trial demand and refiled 14 days later, well within the

60-day period under the rule. *Cf. Kasper*, 411 N.W.2d at 184-85 (noting dismissal-and-recharging about three weeks after expiration of 60-day period). The prosecutor's prompt recharging 14 days after the dismissal reflects an attempt to minimize delay. And, while it would have been quite difficult at that point to hold a trial within the original 60-day period, there was no clear "circumvention" of the rule, as in *Kasper*. *Id.* at 185. But the more significant distinction between recharging the offense in *Kasper* and recharging Mathwig is that the prosecutor in *Kasper* had an adverse ruling that, without appeal, ended his case. *Id.* The case involving the initial charge had ended with the denial of the continuance because the state's only witness was no longer available, and the district court's dismissal of the refiled charge, appealed to the supreme court as a certified question, made it unnecessary for the supreme court to engage in a full-blown *Barker* analysis.

We recognize that it could be argued that the prosecutor's failure to move for a continuance of Mathwig's trial insulated him from ending up in the same circumstance as the prosecutor in *Kasper*. But this argument fails to take into account that the district court found that the prosecutor did not act in bad faith when it dismissed the charges against Mathwig; that the district court found that reasons for the prosecutor's inability to proceed to trial were, at most, negligence and inattention; that the district court concluded that the prosecutor's failure to move for a continuance might have been affected by the district court's unavailability the week preceding trial; and that the prosecutor did not, as the prosecutor in *Kasper* did, directly flout a district court order and misuse a procedural rule to regain jurisdiction.

Thus, although the prosecutor's dismissal and recharging the offense weighs against the state under both the length-of-the-delay and the reason-for-delay *Barker* factors, the conduct was not, as in *Kasper*, sufficiently egregious to amount to an outright speedy-trial violation.

II

Mathwig also argues that he is entitled to a new trial because the state improperly presented evidence of his prior bad acts without complying with the procedures required in *State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965). Specifically, Mathwig objects to a police officer's testimony that explained how he began investigating Mathwig. The officer testified that he had a conversation with a confidential informant (CI) who indicated that he had previously spoken with Mathwig about drugs:

> [W]e began to talk about what do you know and who—who might be using and distributing methamphetamine . . . . [The CI] had, uh, obtained [Mathwig's] phone number [and] apparently there was some prior conversation about, uh, drugs, and [the CI] just proceeded to dial his number and—and talk with him, inquire about, uh, if he can get some stuff.

Mathwig did not object to this testimony at trial.

When a defendant does not object to alleged *Spreigl* evidence at trial, the question on appeal is whether the district court, by failing to sua sponte strike the evidence or provide a cautionary instruction, committed plain error that affected the defendant's substantial rights. *State v. Vick*, 632 N.W.2d 676, 684-85 (Minn. 2001).

We conclude that the district court's decision not to intercede does not require a new trial for two reasons. First, when the challenged testimony is "an ambiguous

description of what may or may not have been a separate *Spreigl* incident, . . . error resulting from the trial court's decision not to intercede [is] not plain." *Id.* at 685. The testimony that Mathwig challenges is a reference to "some prior conversation" about drugs. This is an ambiguous description of what may or may not have been a separate *Spreigl* incident.

Second, the error did not affect Mathwig's substantial rights because it is not reasonably likely that admission of the testimony substantially affected the verdict. *See State v. Smith*, 582 N.W.2d 894, 896 (Minn. 1998). The challenged testimony is insignificant in comparison to the extensive evidence demonstrating that Mathwig conspired to commit second-degree, controlled-substance crime. *See* Minn. Stat. §§ 152.022, subd. 1(1), .096, subd. 1 (defining crime as conspiring to unlawfully sell one or more mixtures of total weight of three grams or more containing methamphetamine).

The evidence included testimony from the CI that he and Mathwig reached an agreement whereby Mathwig would sell him methamphetamine worth more than $400. A man who had been charged as an accomplice in the case also testified against Mathwig in exchange for a plea bargain. He said that he and Mathwig drove to KFC on January 4, 2007, that Mathwig gave him a cigarette pack containing a white substance and told him to sell it to the CI, that he understood he was selling drugs, and that shortly after the transaction took place he and Mathwig were arrested. Additionally, the state introduced a video-recording of the controlled buy, audio-recordings of the conversations between the CI and Mathwig, and testimony that police recovered a total of 5.5 grams of a substance containing methamphetamine.

Any error committed by the district court in failing to intercede was not plain and did not affect Mathwig's substantial rights.

Affirmed.

KLAPHAKE, Judge **(**dissenting**)**

I respectfully dissent. Here, the prosecutor admitted in court that he needed more time to prepare his case and concluded that the district court would deny a continuance motion, stating at the omnibus hearing that "I felt like I was frankly wasting the Court's time asking for a continuance." With the knowledge that the district court would not grant him a trial continuance and in order to obtain more time to prepare his case, the prosecutor dismissed the complaint against appellant. Just nine days later, the prosecutor filed the identical offense in a new complaint.

The law of this state prohibits a prosecutor from circumventing a defendant's right to a speedy trial by deliberate manipulation of the charging process. *State v. Kasper*, 411 N.W.2d 182, 185 (Minn. 1987); *cf. State v. Friberg*, 435 N.W.2d 509, 514 (Minn. 1989) (noting principle, but concluding that prosecutor was not the source of the delay). Under such circumstances, the prosecutor's conduct constitutes a per se violation of a defendant's speedy trial right and mandates dismissal of the complaint. *Kasper*, 411 N.W.2d at 185; *see also* ABA Standards for Criminal Justice 12-2.2(a)(i)(D)(2004) (requiring dismissal of charge with prejudice when prosecutor charges a defendant with an offense, dismisses the charge, and later recharges the defendant with the same offense, based on district court finding that dismissal of charge was "to avoid the effect of the speedy trial time limit").

While the district court found that the prosecutor's conduct was not in bad faith, the prosecutor's own statements reveal otherwise. I would reverse because the state violated appellant's right to a speedy trial by charging him with a crime on January 5,

2007, and failing to bring the case to trial until August 2, 2007, well outside the 60-day limit for a speedy trial required by Minn. R. Crim. P. 11.10. The majority's reliance on the analysis set forth in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192 (1972), is misplaced because the tactics here were deliberate. *Friberg*, 435 N.W.2d at 514 (noting that there is no need to apply *Barker* analysis when it is "patently obvious that [a defendant's] right to trial would have been violated if the prosecutor's maneuver had been allowed to go unchecked" and that "[d]eliberate tactics . . . cannot constitute the good cause intended by the [speedy trial] rule").