STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0349

State of Minnesota,
Respondent,

vs.

Hassan Dahir,
Appellant.

Filed March 10, 2009
Affirmed
Worke, Judge

Hennepin County District Court
File No. 27-CR-07-100081

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

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

Lawrence Hammerling, Chief Appellate Public Defender, Roy G. Spurbeck, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Toussaint, Chief Judge; Worke, Judge; and Randall, 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

WORKE, Judge

Appellant challenges his convictions of aggravated robbery and being an ineligible person in possession of a firearm, arguing that (1) he was denied his right to a speedy trial when his trial began nearly four months after his speedy-trial demand; (2) the evidence is insufficient to sustain his convictions; and (3) he was denied the effective assistance of counsel. We affirm.

D E C I S I O N

Speedy Trial

Appellant Hassan Dahir first argues that his convictions must be reversed because his right to a speedy trial was violated. 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).

"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. Minnesota courts apply a four-part test to determine whether a defendant's speedy-trial right has been violated: "(1) the length of the delay; (2) the reason for the delay; (3) whether and when the defendant asserted his right to a speedy trial; and (4) the prejudice to the defendant caused by the delay." *Cham*, 680 N.W.2d at 124 (citing *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192 (1972)).

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 60 days raises a presumption that a defendant's speedy-trial right has been violated, and requires further inquiry into whether a violation has occurred. *State v. Friberg*, 435 N.W.2d 509, 513 (Minn. 1989). Appellant made a speedy-trial demand on August 7, 2007. Appellant's trial commenced nearly four months later on December 3, 2007; therefore, further inquiry is necessary to determine whether a violation has occurred.

Reason for Delay

The reason for delay is closely related to the length of delay, and different weights are assigned to different reasons. *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192. "A deliberate attempt to delay trial to harm the defense is weighed most heavily against the state." *State v. Brooke*, 381 N.W.2d 885, 888 (Minn. App. 1986). That is not the case here because the delay was caused by court-calendar congestion and the fact that a new judge took over appellant's case. While delays caused by overcrowded courts are weighed against the state because the state is ultimately responsible for such circumstances, this type of delay weighs less heavily against the state. *Id.*; *see also Friberg*, 435 N.W.2d at 513 (stating that "calendar congestion or other circumstances over which the prosecutor has no control are good cause for delays up to fourteen months where the defendants suffered no unfair prejudice").

When appellant made his speedy-trial demand, his attorney indicated that a speedy-trial date would fall into a week that was problematic for the district court and

counsel. Appellant's attorney and the prosecutor had previously agreed to set the matter for trial on October 22, and appellant agreed to the October 22 trial date. The district court stated that October 22 would "presumably be the trial date, all things being equal." Thus, appellant initially agreed to set his trial date beyond the 60-day period. The second continuance occurred on October 22 when a new district court judge took over appellant's case. The district court stated: "The record should and does reflect that it's my unavailability and not that of either the defense lawyer or the prosecutor [delaying the trial date]." Appellant's attorney indicated that the parties agreed to a trial date of November 14 or December 3. Thus, appellant's attorney acquiesced in the continuances. And the delays were attributed to the court calendar and a new judge assuming the calendar. Because the state had no control over these circumstances and because appellant experienced a delay of only four months, appellant's speedy-trial right was not violated unless he suffered unfair prejudice as a result of the delay.

Assertion of Right

Assertion of the right to a speedy trial need not be formal or technical, and it is determined by the circumstances. *State v. Windish*, 590 N.W.2d 311, 317 (Minn. 1999). A court must assess "the frequency and intensity of a defendant's assertion of a speedy trial demand." *Id.* at 318. 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.

Appellant demanded his right to a speedy trial and, at the same time, waived that right to the extent that his trial would occur slightly beyond the 60-day period.

Appellant's attorney then agreed to a November 14 or a December 3 trial date, and appellant's trial commenced on December 3. *See State v. Rachie*, 427 N.W.2d 253, 257 (Minn. App. 1988) (noting that the defendant's failure to object to continuances weighed against the argument that he asserted his right to a speedy trial), *review denied* (Minn. Sept. 20, 1988). This factor is neutral because, despite appellant's clear demand, his attorney agreed to the continued trial date.

Prejudice

Whether a defendant has been prejudiced by a delay encompasses three concerns: (1) preventing oppressive pretrial incarceration, (2) minimizing the anxiety of the accused, and (3) limiting impairment of the defense. *Barker*, 407 U.S. at 532, 92 S. Ct. at 2193. A court should also "consider prejudice from interference with the [defendant's] liberty, disruption of employment, financial hardship, strain on friendships and associations, and anxiety and stress to the defendant and the defendant's family." *Rachie*, 427 N.W.2d at 257 (quoting *Brooke*, 381 N.W.2d at 889). The defendant does not have to prove prejudice; it can be "suggested by likely harm to a defendant's case." *Windish*, 590 N.W.2d at 318.

Appellant argues that he experienced prejudice because he was subject to pretrial incarceration and could not make bail. The district court initially set bail at $40,000. The district court considered but denied appellant's request to be released pending his trial because of the seriousness of the charges and the lengthy sentence that could potentially be imposed. Additionally, the record shows that appellant was without a permanent address and had minimal identifiers, thus, there were concerns that he would be difficult

to locate if he was released and did not appear. Further, appellant received 149 days credit to his prison sentence. Although appellant was incarcerated prior to his trial, he was not prejudiced. *See State v. Givens*, 356 N.W.2d 58, 62 (Minn. App. 1984) (concluding no prejudice when defendant was in custody for five months prior to trial), *review denied* (Minn. Jan. 2, 1985).

Appellant next argues that the delay caused him to experience anxiety. Appellant contends that his repeated requests for prompt disposition demonstrated his anxiety; the record, however, does not support appellant's assertion. The only comment regarding prompt disposition occurred immediately after appellant's demand when his attorney stated that appellant would agree to the first continuance but did not want a trial date beyond October 22. After that, appellant never expressed concern for prompt disposition. Further, appellant fails to provide any specific areas of anxiety other than the stigma of criminal charges and the angst of awaiting trial, which are both commonly experienced by criminal defendants and are insufficient to establish prejudice. *See Friberg*, 435 N.W.2d at 515 (noting that prejudice is not shown when a defendant has failed to show evidence of greater stress, anxiety, or inconvenience than that experienced by anyone who is involved in a trial).

Finally, appellant argues that his defense was "likely harmed" as a result of the delay because it is possible that witnesses identified him merely because he was seated at the defense table. Appellant's argument fails. The victim identified appellant in a photo lineup days after the incident and during trial. Additionally, three officers identified appellant in the courtroom. *See Givens*, 356 N.W.2d at 62 (concluding no prejudice

when defendant was in custody for five months prior to trial and he claimed that witnesses had lost memory of events). Further, the evidence at trial was relatively straightforward. The victim and involved officers testified. No witnesses left the area and no evidence was stale. Appellant does not show how the delay impaired his defense. *See Friberg*, 435 N.W.2d at 515 (stating that when a "delay in no way affect[s] the strength of [the] defendant['s] case, the final *Barker* factor does not favor defendant"). Because appellant does not claim any specific prejudice, and because the record does not disclose any, this factor weighs against him.

Appellant's constitutional right to a speedy trial was not violated. Certain factors, such as the length of the delay and his assertion of the right to a speedy trial, favor him. But because the trial date was continued for reasons beyond the control of the state and because appellant was not prejudiced by the delay, he is not entitled to relief.

Sufficiency of the Evidence

Appellant also argues that the evidence is insufficient to support his convictions. "When reviewing a claim for sufficiency of the evidence, we are limited to ascertaining whether, given the facts in the record and any legitimate inferences that can be drawn from those facts, a jury could reasonably find that the defendant was guilty of the charged offense." *State v. Asfeld*, 662 N.W.2d 534, 544 (Minn. 2003) (quotation omitted). The determination must be made under the assumption that the fact-finder believed the state's witnesses and disbelieved any contrary evidence, and we must view the evidence in the light most favorable to the conviction. *State v. Bias*, 419 N.W.2d 480, 484 (Minn. 1988).

Appellant challenges the victim, B.W.'s, identification, arguing that B.W.'s description of the assailant's clothing did not match his clothing and that he is taller than B.W. described. Appellant also argues that there were no fingerprints recovered and that appellant fled officers because of an outstanding warrant. In viewing the evidence in the light most favorable to the verdict, the evidence is sufficient to sustain appellant's convictions.

B.W. testified that he was walking home one night when he heard people running up behind him. B.W. turned around and saw two men coming toward him—a tall, thin man, approximately 6'2", and a shorter man, approximately 5'9". The tall man was wearing a blue-and-white baseball cap, a blue-and-white t-shirt, and jean shorts. The short man was wearing a white-and-yellow shirt. B.W. observed that they were two black males, approximately 19 to 20 years old. The short man asked B.W. for a lighter, and as B.W. took a lighter out of his pocket, the tall man pulled out a silver automatic gun and said, "Give me everything you got." The men put their hands in B.W.'s pockets and took his cell phone, iPod that had his name engraved on it, and wallet. B.W. identified appellant in a photo lineup days after the incident. The first time B.W. looked at the photo display he stated that he thought the photo of appellant matched the description of the tall man. The second time, B.W. positively identified appellant as the individual who had the gun and took his property. B.W. initially stated that appellant was approximately three inches taller than he. Although B.W. testified that appellant is actually more than three inches taller than he, his description accurately describes appellant as taller than he is. B.W. also identified appellant in the courtroom.

Officers testified that shortly after they were dispatched to the robbery call they observed a vehicle drive by them at a high rate of speed. A traffic stop was initiated and the occupants jumped out of the moving vehicle and ran away in different directions. The officers engaged in a foot chase and found appellant who was out of breath sitting on the steps of a nearby building. Appellant told the officers that he was walking home from a friend's house, but he did not know his friend's name or where his friend lived. Appellant initially refused to give the officers his name. But the officers discovered his name and that he had an outstanding warrant. Officers also observed that appellant fit the description of one of the robbery suspects. The officers then recovered two wallets, a baseball hat, a jersey, and two cell phones from the vehicle, one of which belonged to the victim. On the street near the vehicle officers found an iPod that had the victim's name etched on it. During an interview with a police officer, appellant admitted that he had been in the vehicle and said that he ran because of the warrant.

There was also evidence that appellant had been previously adjudicated delinquent of first-degree aggravated robbery involving a handgun, and was, therefore, ineligible to possess a firearm. The evidence is sufficient to sustain appellant's convictions.

Ineffective Assistance of Counsel

Finally, appellant argues in his pro se supplemental brief that he received ineffective assistance of counsel because his attorney failed to call witnesses. "Generally, a direct appeal from a judgment of conviction is not the most appropriate way to raise a claim of ineffective assistance of trial counsel because the reviewing court does not have the benefit of all the facts concerning why defense counsel did or did not

do certain things." *Roby v. State*, 531 N.W.2d 482, 484 n.1 (Minn. 1995) (quotation omitted). When an ineffective-assistance-of-counsel claim is raised and considered as part of a direct appeal, the party raising it may be barred under *State v. Knaffla*, 309 Minn. 246, 243 N.W.2d 737 (1976) from thereafter raising the claim in a postconviction hearing. *See Hale v. State*, 566 N.W.2d 923, 926-27 (Minn. 1997). When this court lacks a sufficient record upon which to determine whether trial counsel was ineffective, we may decline to reach the merits of the issue and direct the affected party to seek postconviction relief. *State v. Green*, 719 N.W.2d 664, 674 (Minn. 2006). By declining to reach the merits, "[a]n appeal to this court from a post-conviction proceeding on the merits remains open." *State v. Schaefer*, 374 N.W.2d 199, 201 (Minn. App. 1985).

Here, the record is sufficient for review. We conclude that appellant did not receive ineffective assistance of counsel. The decision to call witnesses is left to counsel's discretion. *See State v. Mems*, 708 N.W.2d 526, 534 (Minn. 2006) ("What evidence to present and which witnesses to call at trial are tactical decisions properly left to the discretion of trial counsel."). Further, appellant has failed to indicate who should have been called to testify, what evidence would have been presented through witness testimony, or how the result of the proceedings would have been different because of the witness testimony.

Affirmed.