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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2399

State of Minnesota,
Respondent,

vs.

Daniel Lee Brynteson,
Appellant.

Filed May 5, 2009
Reversed and remanded;
motion to supplement denied;
motion to strike granted in part and denied in part
Ross, Judge

Hennepin County District Court
File No. 27-CR-06-058278

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

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

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

ROSS, Judge

This appeal concerns competency- and speedy-trial-related challenges to the prosecution of a disoriented and combative man who encountered police after he wandered into traffic on a busy highway. On appeal from his obstruction-of-legal-process conviction, Daniel Brynteson argues that the district court abused its discretion by proceeding to trial without a competency evaluation or finding. He also argues that the district court violated his right to a speedy trial. Because the record contains no district court findings for either of the two alleged competency proceedings, we reverse Brynteson's conviction.

During the pendency of this appeal, the state moved to modify or correct the record with an affidavit regarding a second competency evaluation. This prompted Brynteson to file a motion to strike the affidavit and the state's entire brief. We deny the state's motion to supplement the record with an affidavit that contains material and untested hearsay, and we therefore also grant in part Brynteson's motion to strike the affidavit and the state's brief. We do so because accepting the affidavit would essentially create a substantive record rather than merely modify or correct an account of a recorded proceeding.

FACTS

In June 2006, Golden Valley police responded to the report of a man walking into traffic on Olson Memorial Highway. An officer arrived and approached the man, Daniel Brynteson, who was on the shoulder. Brynteson was so challenging and combative when

the officer attempted to attend to Brynteson's safety that a second officer arrived to assist. The officers tried but failed to secure Brynteson in handcuffs, and one officer eventually decided to shock Brynteson with an electrical stunning device commonly referred to as a "Taser." The state charged Brynteson with disorderly conduct and with forcibly obstructing the legal process.

Two developments on January 22, 2007, are the triggering events of this appeal: the district court ordered a competency evaluation and Brynteson demanded a speedy trial. The record regarding Brynteson's competency testing is confused by omissions and gaps. And the treatment of the competency question seems to have impacted the timing of Brynteson's trial.

A competency evaluation occurred on February 1 with Dr. Kathy Harowski. Dr. Harowski completed her report on February 26 and found Brynteson to be competent, but she performed no psychological or cognitive tests. The district court scheduled Brynteson's trial for March 22, 2007, within the speedy-trial presumptive deadline. But Brynteson's trial did not occur on March 22 because the state and Brynteson each sought a short continuance. And on March 30, the district court suspended proceedings because it perceived that, despite Dr. Harowski's report, Brynteson appeared to be unfit to proceed to trial; the district court considered Brynteson to be a danger to himself, and, because the district court believed that the evaluation needed but lacked testing for cognitive and psychological disorders, it implicitly deemed Dr. Harowski's evaluation to be unreliable. The district court therefore ordered a second competency evaluation.

Whether that second evaluation ever occurred is unclear, based on the record available on appeal. It is clear that on July 19, 2007, Brynteson appeared for trial and renewed his speedy-trial demand. But he also challenged the admissibility of testimony, and so, on July 23, the district court conducted an omnibus hearing. After that hearing, the district court denied Brynteson's motion to suppress and set the case for trial. The trial did not occur as scheduled because a witness was unavailable to testify.

Brynteson's trial occurred on August 20, 2007. The jury found him guilty of obstruction of legal process and disorderly conduct.

At his sentencing, Brynteson's counsel asserted on the record that she had made prior off-the-record objections about the pretrial competency-related events. She emphasized that the record lacked any district court finding that Brynteson was fit for trial. And she asserted that she personally believed that Brynteson had been unfit to stand trial. The district court fined Brynteson $100 and imposed a jail sentence that it stayed subject to probation for two years.

Brynteson noticed this appeal. Nearly seven months after notice of appeal, the state moved this court to correct or modify the record to include the prosecutor's affidavit about events of July 19 and July 25, 2007. The affidavit regards a proceeding before the district court judge about an alleged second competency evaluation and the reason for the witness's unavailability. Brynteson opposed the motion and moved to strike the state's brief and appendix for including material outside the record.

D E C I S I O N

I

We first address Brynteson's motion to strike. The state attempts to supplement the record with the prosecutor's affidavit that purports to describe an in-chambers competency discussion between the prosecutor, Brynteson, the district court judge, and Dr. Lawrence Pancera. Brynteson counters by asking us to strike the affidavit from the state's appendix and to strike the state's entire brief, which references the challenged affidavit.

Brynteson's counter is well founded. On appeal, the record consists only of "[t]he papers filed in the [district] court, the exhibits, and the transcript of the proceedings, if any." Minn. R. Civ. App. P. 110.01; *see* Minn. R. Crim. P. 28.02, subd. 8 (similarly describing record on appeal). We cannot base our decision "on matters outside the record on appeal, and matters not produced and received in evidence below may not be considered." *State v. Larson*, 520 N.W.2d 456, 464 (Minn. App. 1994) (quotation omitted), *review denied* (Minn. Oct. 14, 1994). We generally disregard matters that are not part of the record. *State v. Murphy*, 545 N.W.2d 909, 918 (Minn. 1996).

Although we may allow a party to modify or correct the record, Minn. R. Civ. App. P. 110.05, the state's proffered affidavit would *create* a record of a proceeding that is contested by Brynteson and uncorroborated by any designation in the record. The affidavit is the prosecutor's testimony about alleged events, and the gist of the testimony is the hearsay statement of an unexamined witness whose testimony is nowhere in the record and who purportedly opined about Brynteson's competency. Parties must make a

contemporaneous record of matters to be considered on appeal.

We recognize that circumstances might at times prevent making a contemporaneous record, but even so, the state had better options to preserve the matter. The ambiguous record seems to indicate that a court reporter was present during the unrecorded in-chambers discussion, and, if so, the state could have requested the reporter to transcribe the proceedings. The state could have attempted to secure Brynteson's stipulation of events soon after the proceeding if no court reporter was present. It could have attempted to establish the record of the alleged events by an on-the-record colloquy with the district court about the July 19 proceeding at a later proceeding, like the July 23 omnibus hearing. It could have sought leave to submit the hearsay testimony as direct testimony from the witness in an affidavit to the district court. The state could have asked the district court to adopt the prosecutor's affidavit as the accurate description of the hearsay statement that allegedly had been made in the presence of the district court. It also could have taken steps to file a statement of proceedings approved by the district court. Minn. R. Civ. App. P. 110.03. Any of these options, and perhaps others, would have provided some basis to validate the facts asserted in the prosecutor's affidavit and made unnecessary the state's attempt on appeal to create a record of a proceeding from whole cloth.

As it stands, without a stipulation between the parties or adoption by the district court, the state's proffered record of events as presented by hearsay affidavit on appeal can be grafted onto the record over Brynteson's objection only if we act with considerable speculation. We do not suggest any doubt about the credibility of the

affiant, but we decline to accept the affidavit in the interest of fairness to Brynteson.

Because we see this affidavit as essentially creating a record with hearsay testimony rather than merely modifying or correcting an existing record, we deny the state's motion to "supplement" the record, and we grant Brynteson's motion to strike the affidavit from the state's appendix. We will not consider any part of the state's brief that relies on the affidavit. But because the state's brief contains other information from the record and cites to relevant law in its response to Brynteson's appeal, we deny Brynteson's motion to strike the state's *entire* brief.

II

Brynteson argues that that the district court abused its discretion by trying him without a competency evaluation or finding. We agree that the lack of any competency finding after the district court expressly questioned Brynteson's competency is fatal to his conviction. District courts generally have discretion regarding procedural rulings, and we will not reverse those rulings unless we find a clear abuse of discretion. *State v. Washington*, 521 N.W.2d 35, 41 (Minn. 1994). But trying a defendant without a competency finding after questioning the defendant's competency is beyond the district court's discretion.

When the district court orders a competency evaluation, it must suspend the criminal proceedings and take specific steps culminating in a specific finding of competence or incompetence. If at any time during the proceedings, the district court "has reason to doubt" the defendant's competency, it must address and resolve that concern. Minn. R. Crim. P. 20.01, subd. 2; *see State v. Bauer*, 310 Minn. 103, 114, 245

N.W.2d 848, 854 (1976) (noting that if district court has sufficient doubts about defendant's competence, then it "must observe procedures adequate to ensure the defendant's competency"). In misdemeanor cases, the district court shall proceed under rule 20, start civil commitment proceedings, or dismiss the case. Minn. R. Crim. P. 20.01, subd. 2(1). The district court must appoint at least one examiner to evaluate the defendant and report to the district court about the defendant's condition. Minn. R. Crim. P. 20.01, subd. 2(3). After the evaluation, the examiner will write a report "to the judge who ordered the examination." Minn. R. Crim. P. 20.01, subd. 2(4). After this, a hearing may be necessary. *See* Minn. R. Crim. P. 20.01, subd. 3(1) (requiring a hearing if either party files written objections to report). If no objections are filed, then the district court can determine the defendant's competency on the basis of the report. Minn. R. Crim. P. 20.01, subd. 3(5). Regardless of whether a hearing occurs, the district court "shall enter an order finding that the defendant is competent . . . [or] an order finding that the defendant is incompetent." Minn. R. Crim. P. 20.01, subd. 3(6).

On our record, we conclude that the district court exceeded its discretion by proceeding to trial without making a competence or incompetence finding. The district court ordered Brynteson to undergo two competency evaluations. The first evaluation resulted in a report, but the record contains no finding of competence or incompetence by the district court. At a later hearing, a different district court judge ordered a second competency evaluation based on Brynteson's "agitated, infuriated, [and] paranoid" courtroom demeanor and based on the lack of testing for cognitive or psychological disorders in the first competency evaluation. Nothing in the record indicates that a

second competency evaluation occurred. The record contains no report, which should have been written and forwarded to the district court under rule 20.01. The record also contains no district court finding of competence or incompetence regarding any second evaluation. Even if we had considered the state's rejected affidavit, the lack of any district court finding *one way or the other* on the issue of competence renders the trial infirm under the rule.

We recognize that the judge who ordered the second competency evaluation is also the judge who presided over Brynteson's trial. But this factor does not circumvent rule 20.01's requirements. The supreme court has directed district courts to make explicit findings on a defendant's competence or incompetence. *See State v. Swain*, 269 N.W.2d 707, 719 (Minn. 1978) (noting that record should have contained psychiatrists' reports and district court should have made finding on defendant's competency); *see also In re Miner*, 411 N.W.2d 525, 527–28 (Minn. App. 1987) (noting that criminal division should have explicitly ruled on competency and remanding for competency finding). Because the district court failed to comply with rule 20.01's requirements by making no finding regarding competence, we conclude that the district court abused its discretion by proceeding to trial.

Brynteson's competence argument also includes several references to the Fourteenth Amendment. Having decided that the district court violated Brynteson's right to a pretrial finding regarding competence under rule 20, we do not address any similar related right that arises from the Constitution, such as Brynteson's argument might be read to invoke. "We do not decide constitutional questions except when necessary to do

so in order to dispose of the case at bar." *State v. Hoyt*, 304 N.W.2d 884, 888 (Minn. 1981) (refusing to reach constitutional claim after reversing conviction on other grounds); *In re Senty-Haugen*, 583 N.W.2d 266, 269 n.3 (Minn. 1998) ("It is well-settled law that courts should not reach constitutional issues if matters can be resolved otherwise.").

III

Brynteson also argues that he was denied his right to a speedy trial. We have considered Brynteson's speedy-trial claim under *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192 (1972), and *State v. Windish*, 590 N.W.2d 311, 315–19 (Minn. 1999), and we are not persuaded. Although the length of delay and Brynteson's consistency in asserting his request for a speedy trial favor his claim, the other two factors—reason for the delay and prejudice to the defendant—weigh against reversal. The most significant part of the delay resulted when the district court observed Brynteson on the day set for trial and concluded from his courtroom behavior that Brynteson may not be competent for trial. This was not apparently a case delayed mainly by court congestion, although there were also witness- and staff-related difficulties. The delay was caused primarily by the district court's effort to vindicate Brynteson's rights regarding competency. Brynteson was not incarcerated during the delay and he points almost exclusively to inconvenience, frustration, and a $45 cab fare as the sources of his claim to prejudice. These are legitimate concerns, but under these circumstances, we cannot conclude that the delay in trying Brynteson was unconstitutional.

Reversed and remanded; motion to supplement denied; motion to strike granted in part and denied in part.