

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2012).

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1480**

State of Minnesota,
Appellant,

vs.

Fred Ernest Kraus,
Respondent.

**Filed January 22, 2013
Affirmed
Kirk, Judge**

Dakota County District Court
File No. 19-K6-00-002042

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

James C. Backstrom, Dakota County Attorney, Tricia A. Loehr, Assistant County Attorney, Hastings, Minnesota (for appellant)

Drake D. Metzger, Doyle Hance, LLC, Minnetonka, Minnesota (for respondent)

Considered and decided by Kirk, Presiding Judge; Ross, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

KIRK, Judge

Respondent Fred Ernest Kraus is accused of sexually assaulting a six-year-old boy. In 2000, he was charged by complaint warrant in Dakota County with two counts of

criminal sexual conduct in the first degree and one count of criminal sexual conduct in the second degree. It was not until 2012 that respondent was arrested and brought to trial. Respondent successfully sought a dismissal from the district court on speedy-trial grounds. Appellant State of Minnesota now asks us to determine whether a nearly 12-year postaccusation, prearrest delay in bringing respondent to trial constitutes a violation of his Sixth Amendment right to a speedy trial. It does, and we affirm.

FACTS

On November 9, 1999, a nurse with the Midwest Children's Resource Center contacted an investigator with the Inver Grove Heights Police Department to report a sexual assault of a minor. The nurse had interviewed a six-year-old boy who alleged that respondent—the boyfriend of the child's grandmother—had anally penetrated him with his penis. The child was staying at his grandmother's house when the incident occurred, and respondent was also living in the home. Police contacted the child's grandmother about the allegations, and she subsequently kicked respondent out of her house.

On December 3, the investigator attempted to contact respondent at his father's house where it was believed he might be living. The investigator knocked on the door. No one answered, so she left her card with a message for respondent to call her. The investigator also had a phone number believed to be respondent's. She called the number and spoke with someone who claimed to be respondent's sister. The investigator left a message asking that respondent return her call. He never called her back.

At the end of that month, the investigator rotated out of the investigation division and back to patrol. On July 25, 2000, the district court issued a complaint warrant for

respondent's arrest. The warrant was subsequently reviewed by the district court several times over nearly 12 years. The county maintains no records to indicate conclusively whether law enforcement renewed its efforts to locate respondent during that time.

In late January 2012, Dakota County deputy sheriff Rhonda Doheny had some downtime and used it to research outstanding arrest warrants. She reviewed respondent's complaint warrant, searched the Minnesota Court Information System to learn if there had been any law enforcement contact with respondent, and then checked the Minnesota Driver and Vehicle Services website for an address associated with respondent's driver's license. She found a St. Paul address for respondent. Respondent's driving record indicated that, in 1997, the state sent respondent three letters at that same address regarding unfulfilled child-support obligations. The letters were returned. Despite this, the investigator referred respondent's address to the county's fugitive task force. Respondent was arrested in St. Paul on February 1, 2012.

Respondent claims that he was a resident of Ramsey County since November 1999, has never used an assumed name, false date of birth, or alias, and that he worked in a job where he believed he was subject to background checks. He admits to knowing that allegations had surfaced that he had engaged in criminal sexual conduct. Yet he maintains that until his arrest he was unaware that he was formally charged with a crime or that there was a warrant for his arrest.

At an omnibus hearing on February 28, 2012, respondent waived his right to a speedy trial. Following a hearing in August 2012, the district court granted respondent's

motion to dismiss for violation of his Sixth Amendment right to a speedy trial, based on the state's postaccusation, prearrest delay. The state appeals.

DECISION

The right to a speedy trial “is as fundamental as any of the rights secured by the Sixth Amendment [to the United States Constitution]” and is enforceable against the states by virtue of the Fourteenth Amendment. *Klopfer v. North Carolina*, 386 U.S. 213, 223, 87 S. Ct. 988, 993 (1967). The right to a speedy trial is also secured by Article I, Section 6 of the Minnesota Constitution. A speedy-trial challenge presents a constitutional question that is subject to de novo review. *State v. Griffin*, 760 N.W.2d 336, 339 (Minn. App. 2009). However, this court defers to a district court's findings of fact unless they are clearly erroneous. *State v. Critt*, 554 N.W.2d 93, 95 (Minn. App. 1996), *review denied* (Minn. Nov. 20, 1996).

In analyzing whether respondent's right to a speedy trial was violated, the district court applied the four factors discussed in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192 (1972). Those factors, which are used in determining claims of a failure to provide a speedy trial, are: (1) the length of the delay, (2) the reason for the delay, (3) the accused's assertion of the right to a speedy trial, and (4) the prejudice that the accused may suffer as a consequence of the violation of the right. *Barker*, 407 U.S. at 530, 92 S. Ct. at 2192. No single factor is determinative of whether a violation has occurred, but must be considered together along with other relevant circumstances. *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999). Among the other relevant circumstances in this

analysis is the seriousness of the alleged offense. *State v. Sistrunk*, 429 N.W.2d 280, 282 (Minn. App. 1988), *review denied* (Minn. Nov. 23, 1988).

A. Length of the delay.

Unless there is a delay that is presumptively prejudicial, this court is not required to analyze the *Barker* factors. *Id.* Our supreme court has held that a six-month delay is sufficient to trigger application of the other factors. *State v. Corarito*, 268 N.W.2d 79, 80 (Minn. 1978). The complaint warrant was issued by the district court on July 25, 2000, and respondent’s first appearance was on February 2, 2012, a period of nearly 12 years. This delay is presumptively prejudicial and the remaining *Barker* factors must be analyzed.

The state argues that rather than the date the complaint warrant was issued, the delay should be measured from the expiration of the nine-year statute of limitations, resulting in a three-year, three-month delay.¹ *See* Minn. Stat. § 628.26(c) (1996). The state characterizes this delay as “not exceedingly long.”

We cannot endorse the state’s novel approach to calculating the length of the delay. The Sixth Amendment right to a speedy trial attaches and is calculated from the earlier of two points: when a formal indictment or information is issued, or when the accused is arrested and held to answer a criminal charge. *State v. Jones*, 392 N.W.2d 224, 235 (Minn. 1986); *see also State v. F.C.R.*, 276 N.W.2d 636, 639 (Minn. 1979)

¹ The state also analyzes Minn. R. Crim. P. 11.09, which establishes a 60-day time period for trial to commence once either party has demanded a speedy trial. The rule appears to be largely inapplicable to the present case because during the period of delay under dispute—running nearly 12 years—neither party entered a demand for a speedy trial.

(concluding that the Sixth Amendment right attached when the accused, who at the time was incarcerated on other grounds, was charged). The state has not identified an authority to support its proposition that the length of the delay is calculated from the running of the statute of limitations. Even if it were possible to use the state's math, it accomplishes little. We are still left with a presumptively prejudicial three-year, three-month delay.

The state also argues that, were this court to conclude that the delay here is presumptively prejudicial (no matter how it is calculated), Minnesota's courts will face a deluge of speedy-trial "*Doggett*" motions, referring to *Doggett v. United States*, 505 U.S. 647, 112 S. Ct. 2686 (1992). *Doggett* was indicted for conspiracy to import and distribute cocaine, but before he could be taken into custody he left for Colombia. *Doggett*, 505 U.S. at 648-49, 112 S. Ct. at 2689. He then traveled to Panama where he was arrested on drug charges. *Id.* at 649, 112 S. Ct. at 2689. Instead of actively seeking formal extradition of *Doggett*, U.S. law enforcement merely asked Panamanian officials to "expel" him to the United States. *Id.* Instead, *Doggett* returned home on his own volition some time later, passing undetected through U.S. customs and settling down in Virginia where he married, earned a college degree, found a steady job, and lived openly under his own name before he was apprehended. *Id.* The supreme court concluded that "the extraordinary 8½-year lag between *Doggett*'s indictment and arrest clearly suffices to trigger the speedy trial enquiry." *Id.* at 652, 112 S. Ct. at 2691.

The state argues that, if this court applies *Doggett* in its analysis of whether respondent was presumptively prejudiced by the delay, suspects will begin to actively

evade law enforcement in the hopes of delaying court proceedings, creating a presumptive prejudice, and forcing dismissal for a speedy-trial violation. The state's argument is problematic for two reasons. First, it ignores that a finding of presumptive prejudice is not the point of termination of a speedy-trial analysis. It is the point of departure into the application of the *Barker* factors. Second, the state's argument is inattentive to crucial reasoning in *Doggett*, where the court distinguished between justified and unjustified delays. *See id.* at 656-57, 112 S. Ct. at 2693. On one end of the spectrum is delay precipitated by the reasonably diligent but unsuccessful efforts of the state to bring the accused to justice. *Id.* at 656, 112 S. Ct. at 2693. When such is the case, the speedy-trial claim of the accused generally fails as a matter of course, absent a showing of specific prejudice to his defense. *Id.* On the other end of the spectrum is the willful delay of the government in order to gain an unfair prosecutorial advantage. *Id.* Such conduct presents "an overwhelming case for dismissal." *Id.*

In the middle are cases like the present one, where the delay in bringing the accused to trial is driven by the state's negligence. *See id.* at 656-57, 112 S. Ct. at 2693. "Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun." *Id.* at 657, 112 S. Ct. at 2693. Such negligence initially produces minimal evidentiary prejudice to the accused, but ongoing delay compounds the prejudice over time, and the court's "toleration of such negligence varies inversely with its protractedness." *Id.* For the state's prediction of a deluge of speedy-trial challenges to

come true, each accused must be prepared to show that the delay in coming to trial was caused by the bad faith or negligence of the state and, in the case of the latter, that the negligence was unduly protracted. For these reasons, we do not agree that applying the principles of *Doggett* will damage judicial processes.

B. Reason for the delay.

The second *Barker* factor considers the reason for the delay. “A defendant has no duty to bring himself to trial.” *Barker*, 407 U.S. at 527, 92 S. Ct. at 2190. Instead, the state has the primary burden of ensuring a speedy trial. *Windish*, 590 N.W.2d at 316. As discussed above, different reasons leading to the delay give rise to different weights being applied for this factor. *See State v. Brooke*, 381 N.W.2d 885, 888 (Minn. App. 1986).

The district court found that the delay here was largely attributable to the state’s negligence. The court recognized that technology limitations may have hampered efforts to locate respondent in 1999 and 2000, but that there was no evidence that any efforts were made to locate respondent between July 2000, when the complaint warrant issued, and January 2012, when Deputy Doheny investigated the matter.

The state contends that its negligence was minimal because, unlike law enforcement in *Doggett*, the state had no actual knowledge of where respondent was located. This comparison, however, is faulty. *Doggett*’s location was known to law enforcement, but he was in another country. In contrast, the state may have lacked actual knowledge of respondent’s location, but he took up residence the next county over, where he lived for the duration of the delay. The deputy sheriff who discovered respondent’s address testified that she was able to find the address quickly through a search of the

Minnesota Driver and Vehicle Services website. Although such databases have become more sophisticated with time, it would appear that the state identified respondent through a relatively uncomplicated search of his driving record, which is a database that we trust that police officers frequently search as part of their regular duties. The failure of the state to make this simple database search appears especially egregious in light of its knowledge of the very serious crimes that respondent is suspected of committing.

On the other side of the coin, it is true that a defendant who actively evades the police can contribute to the delay in bringing his case to trial. *See State v. DeRosier*, 695 N.W.2d 97, 109 (Minn. 2005). The district court found that respondent was aware of the allegations against him, but suggested that respondent did not know that a warrant for his arrest had been issued. The district court observed that respondent believed that he had passed a background check in order to get a job, and that he had twice met with deputy sheriffs as part of his job duties, yet no one ever told him he was the subject of an arrest warrant. In 1999 (before charges were filed against respondent), an Inver Grove Heights investigator left a phone message with someone who claimed to be respondent's sister, asking him to return her call. Respondent never contacted her. The record does not disclose whether respondent actually knew that police were attempting to contact him. It is possible that respondent minimally contributed to the delay in bringing his case to trial, but this weighs only slightly against the state's negligence in failing to pursue respondent. Therefore, we conclude that this factor weighs heavily against the state.

C. Respondent's assertion of a right to speedy trial.

“The defendant’s assertion of his speedy trial right . . . is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right.” *Barker*, 407 U.S. at 531-32, 92 S. Ct. at 2192-93. The frequency and force of the demand is to be weighed in this factor. *Id.* at 529, 92 S. Ct. at 2191. An accused “is not to be taxed for invoking his speedy trial right only after his arrest” if he was not aware of the charges against him before he was arrested. *Doggett*, 505 U.S. at 653-54, 112 S. Ct. at 2691.

Here, the district court held that this factor weighs heavily against the respondent because he waived his right to a speedy trial at an appearance on February 28, 2012. Respondent argues that the district court erred in this conclusion because respondent’s waiver of his right to a speedy trial was a prospective waiver under Minn. R. Crim. P. 11.09, not a retroactive waiver of the state’s delay during the postaccusation, prearrest period.

In this case, respondent admitted to knowing that he was suspected of the underlying crimes, but we find nothing in the record to establish that he knew that charges had actually been filed against him. Moreover, respondent conducted himself like someone who was unaware that the state had formally charged him with these crimes. He lived in St. Paul continuously during the period of delay, he held a job, claims to have been subjected to a background check, and occasionally had contact with deputy sheriffs through his job duties.

The application of this *Barker* factor makes little sense in the context of an accused who is unaware that he is facing charges. For nearly 12 years, respondent was not able to invoke his right to a speedy trial because he was unaware that a trial was looming. The district court's conclusion that this factor weighs against respondent only makes sense in the context of a speedy-trial challenge brought under Minn. R. Crim. P. 11.09, which establishes a 60-day deadline for a trial to commence after the accused invokes his speedy-trial right. But that is not the type of challenge that respondent is addressing here. Instead, the challenge is predicated on a postaccusation, prearrest delay. It is not fair to weigh this factor against respondent when he otherwise had no opportunity to invoke his right to a speedy trial. Instead, this factor weighs slightly against the state for its failure to give respondent sufficient notice of the charges so that he could have availed himself of his right to demand a speedy trial.

D. Prejudice to respondent.

A defendant has no affirmative duty to prove that he was prejudiced by the delay in coming to trial; instead, prejudice may be suggested by likely harm to his case. *Windish*, 590 N.W.2d at 318. Whether a defendant is prejudiced is answered by weighing three factors: (1) avoidance of oppressive pretrial incarceration; (2) minimizing the defendant's anxiety and concern; and (3) preventing impairment of the defendant's defense. *Id.* The third of these factors—impairment of the defendant's defense—is the most serious because it “skews the fairness of the entire system.” *Doggett*, 505 U.S. at 654, 112 S. Ct. at 2692. Here, the first and second factors are irrelevant because respondent was not incarcerated or aware of the charges he now faces.

The state argues that the delay is not prejudicial because the victim provided videotaped descriptions of what occurred close to the time of the incident, and because he remains available to testify today. The state contends that the “majority” of the evidence in this case is testimonial and the delay in bringing the case to trial can only benefit respondent. The state does not explain how deterioration of witnesses’ memories will benefit respondent, but “excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or . . . identify.” *Id.* at 655, 112 S. Ct. at 2693. As the district court noted, the case may well come down to a he said/he said dispute. Both parties would be hampered in presenting their cases because of the 12-year diminution in the memories of the people involved. This factor weighs in favor of the respondent.

E. Other relevant circumstances.

In sum, all of the *Barker* factors weigh in favor of a finding that respondent’s right to a speedy trial was violated. Yet this court may also consider, as an additional relevant factor, the severity of the offense. *Sistrunk*, 429 N.W.2d at 282. The criminal sexual conduct alleged here is sobering and, if proven true, represents the victimization of a child that is shocking to the conscience. We afford the severity of the offense great weight here.

Yet this is a court of law, and we can find no lawful authority that permits us to abandon our fealty to the constitutional rights of respondent, especially considering that all of the *Barker* factors weigh in his favor. We also note that this is not the first time this court has been forced to strike the troubling balance between the guarantee of a speedy

trial and the state's duty to bring a wrongdoer to justice. In *State v. Phommakhy*, our colleagues reached the same result we reach today in a case involving similar facts, including a charge of criminal sexual conduct in the third degree, a failure by the state to diligently pursue Phommakhy, and a three-plus year delay between the charge and the arrest. No. A05-293 (Minn. App. Aug. 23, 2005). While not precedential, we find *Phommakhy* bears persuasive weight considering the close alignment of the facts.

The severity of this offense was as apparent nearly 12 years ago as it is today, yet the state unjustifiably allowed the four *Barker* factors to accrue in respondent's favor. Taken in their totality, the *Barker* factors are not outweighed by the severity of respondent's offense. This matter must be dismissed because the Sixth Amendment to the United States Constitution requires it.

Affirmed.