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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-807**

State of Minnesota,
Respondent,

vs.

Christopher Michael Loving,
Appellant.

**Filed March 29, 2011
Affirmed
Bjorkman, Judge**

Olmsted County District Court
File No. 55-CR-09-7122

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

Mark A. Ostrem, Olmsted County Attorney, James P. Spencer, Assistant County Attorney, Rochester, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Stoneburner, Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

In this appeal from his conviction of three controlled-substance offenses, appellant argues that he was denied the right to a speedy trial. We affirm.

FACTS

Appellant Christopher Loving was arrested on December 3, 2008, after selling crack cocaine to a confidential informant (CI) during two controlled buys. In a December 5, 2008 complaint, the state charged Loving with two counts of second-degree controlled-substance crime (sale) and one count of third-degree controlled-substance crime (sale). Loving filed a demand for a speedy trial on March 24, 2009, and his trial was scheduled for May 20. One week before trial, the state dismissed the charges, because it was unable to locate the CI. However, the state indicated that it intended to refile the charges if it located the CI.

The state subsequently located the CI and refiled the charges in September. Loving pleaded not guilty, and the state filed a speedy-trial demand. Trial was scheduled for December 7. On December 1, the state dismissed other, unrelated charges against Loving and withdrew its speedy-trial demand. One week later, Loving demanded a speedy trial, and trial was scheduled for February 1, 2010.

Loving reiterated his speedy-trial demand on December 17, 2009. On December 29, Loving moved to have the charges dismissed based on the violation of his speedy-trial right. The district court denied the motion. Loving waived his right to a jury trial and submitted the charges to the district court. The district court found Loving guilty of all three offenses. This appeal follows.

DECISION

The federal and Minnesota constitutions guarantee a criminal defendant the right to a speedy trial. U.S. Const. amend. VI; Minn. Const. art. I, § 6; *see also* Minn. R. Crim.

P. 11.09. We review de novo whether a defendant's right to a speedy trial has been violated. *State v. Griffin*, 760 N.W.2d 336, 339 (Minn. App. 2009).

In determining whether a defendant's speedy-trial right has been violated, we consider the four factors the United States Supreme Court identified in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192 (1972): "(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." *State v. Cham*, 680 N.W.2d 121, 124 (Minn. App. 2004), *review denied* (Minn. July 20, 2004). No single factor is necessary to or dispositive of a determination that a defendant was denied the right to a speedy trial; the factors must be considered together in light of the relevant circumstances. *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999).

Length of delay

The Minnesota Rules of Criminal Procedure require that trial commence within 60 days of a speedy-trial demand unless good cause is shown. Minn. R. Crim. P. 11.09. Delay beyond the 60-day period creates 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).

Because the state dismissed and refiled the charges against Loving, the length of delay is calculated in two parts. The parties agree and the record reflects that the total time counted against Loving's speedy-trial demand is 106 days. *See State v. Kasper*, 411 N.W.2d 182, 184 (Minn. 1987) (stating, in context of misdemeanor case, 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”). Accordingly, we presume that Loving’s speedy-trial right was violated and consider the other *Barker* factors.

Reason for delay

The state is responsible for promptly bringing a case to trial, but the reason for the delay makes a difference in determining whether a defendant’s speedy-trial right has been violated. *Barker*, 407 U.S. at 529, 531, 92 S. Ct. at 2191-92. Deliberate attempts to delay trial weigh heavily against the state. *Id.* Delay occasioned by negligence or court congestion weighs “less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.” *Id.* A trial delay does not violate a defendant’s right to a speedy trial if “good cause” is shown for the delay. Minn. R. Crim. P. 11.09, subd. (b).

There are two reasons for the delay here—the unavailability of the CI and the crowded court calendar. The parties primarily focus on the first of these reasons. “Normally, the unavailability of a witness constitutes good cause for delay.” *Windish*, 590 N.W.2d at 317. But the supreme court has emphasized that a prosecutor “must be diligent in attempting to make witnesses available and the unavailability must not prejudice the defendant.” *Id.* The state’s “lack of diligence” in ensuring a witness’s appearance weighs against the state. *See id.* (noting that the state “did not produce any evidence of its efforts”).

The state does not argue that it was diligent in ensuring the CI’s appearance but asserts that it did not act in bad faith. While Loving does not dispute this, under *Windish*, the absence of bad faith does not equal good cause for delay. *See id.* But the undisputed

absence of bad faith means that this factor weighs only slightly against the state. *See Barker*, 407 U.S. at 531, 92 S. Ct. at 2192 (stating that delay caused by negligence does not weigh heavily against the state but “should be considered”).

As to the second reason for the trial delay, good cause does not include calendar congestion unless exceptional circumstances exist. *McIntosh v. Davis*, 441 N.W.2d 115, 119-20 (Minn. 1989) (identifying “the death of the trial judge or if the courthouse burned and there was no immediate space available” as exceptional circumstances). The state does not assert that exceptional circumstances exist here. Accordingly, we conclude that the delay attributable to calendar congestion also weighs slightly against the state.

Assertion of the right

A court must assess “the frequency and intensity of a defendant’s assertion of a speedy trial demand—including the import of defense decisions to seek delays.” *Windish*, 590 N.W.2d at 318. While there is no requirement that a defendant continue to reassert the demand, we consider 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 (citing *Barker*, 407 U.S. at 529, 531, 92 S. Ct. at 2191-92).

Loving did not demand a speedy trial until March 2009, more than three months after first being charged. When the state refiled the charges, Loving again waited three months to demand a speedy trial. But we observe that the state requested a speedy trial after it refiled the charges against Loving. Thus, Loving’s delay in asserting his speedy-

trial right does not weigh against him. But his multiple demands weigh only slightly in his favor.

Prejudice

Prejudice is measured in light of the interests that the speedy-trial right is designed to protect. *Barker*, 407 U.S. at 532, 92 S. Ct. at 2193. The interests that must be considered are: (1) preventing oppressive pretrial incarceration; (2) minimizing the accused's anxiety and concern; and (3) limiting the possibility that the defense will be impaired. *Windish*, 590 N.W.2d at 318. The third interest, possible impairment of a defendant's defense, is the most important. *Id.* A defendant is not required to prove specific prejudice. *Id.*

Loving asserts that the trial delay prejudiced him in two ways. First, Loving claims that the trial delay caused him to suffer lengthy pretrial incarceration. We disagree. If a defendant is being held for other reasons, his pretrial incarceration is not oppressive. *See id.* ("The first two concerns regarding prejudice do not apply under the unique facts of this case as [the defendant] was already in custody for another offense."). It is undisputed that Loving was in custody on unrelated charges for a significant portion of the time he was held awaiting trial in this case. For example, although Loving was released upon the state's dismissal of the charges in May 2009, he was in custody again on other charges when the state refiled the charges in September 2009, and he does not dispute that other charges were pending against him for the remainder of the pretrial period. Accordingly, the delays in bringing the charges against Loving to trial did not cause him prejudice in the form of oppressive pretrial incarceration.

Second, Loving asserts that he experienced anxiety due to the fluctuating availability of the CI. But this anxiety is no more than any defendant's concern about whether the state will be able to prove its case against him. Loving has not asserted and the record does not reflect "any particularized evidence of . . . anxiety or concern beyond that typically experienced by a defendant in a criminal proceeding." *See State v. Williams*, 757 N.W.2d 504, 514 (Minn. App. 2008), *aff'd*, 771 N.W.2d 514 (Minn. 2009); *see also State v. L'Italien*, 363 N.W.2d 490, 493 (Minn. App. 1985) (stating that the "anxiety suffered waiting for trial is not a serious allegation of prejudice"), *review denied* (Minn. Apr. 26, 1985). Accordingly, this claim of prejudice also fails.

Finally, Loving does not claim, and the record does not reflect, that the delay impaired Loving's defense.

After considering the record and all of the *Barker* factors, we conclude that the 106-day delay in bringing Loving to trial does not require reversal of his conviction. The state did not intentionally or excessively delay the trial, and Loving did not suffer any meaningful prejudice from the delay. Accordingly, Loving's speedy-trial claim fails.

Affirmed.