STATE OF MINNESOTA
IN COURT OF APPEALS
A12-287

State of Minnesota,
Appellant,

vs.

Roger Lynn Hiller,
Respondent

Filed September 4, 2012
Affirmed
Peterson, Judge

Beltrami County District Court
File No. 04-CR-1-2328

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

Timothy R. Faver, Beltrami County Attorney, Annie P. Claesson-Huseby, Assistant County Attorney, Bemidji, Minnesota (for appellant)

Benjamin F. Gallagher, Gallagher Law Firm, St. Paul, Minnesota (for respondent)

Considered and decided by Hudson, Presiding Judge; Peterson, Judge; and Schellhas, Judge.

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

PETERSON, Judge

In this pretrial appeal, the state argues that because it properly exercised its discretion to dismiss the complaint against respondent under Minn. R. Crim. P. 30.01 and

later recharged respondent, the district court erred in sua sponte dismissing the reissued complaint under Minn. R. Crim. P. 30.02. We affirm.

FACTS

On July 20, 2011, the state charged respondent Roger Hiller with second-degree driving while impaired (DWI). On August 23, Hiller provided the state with disclosures under Minn. R. Crim. P. 9.02 that identified two defense witnesses but did not identify any of the witnesses as an expert witness. At an uncontested omnibus hearing on September 26, Hiller pleaded not guilty. A pretrial hearing was scheduled for January 10, 2012.

A contested implied-consent hearing that arose from the same incident as the DWI charge was scheduled for September 15, 2011, but was twice continued at Hiller's request. On November 28, Hiller sent the prosecutor involved in the criminal matter a letter stating that he intended to call three witnesses at the implied-consent hearing and that one of the witnesses was an expert who would provide opinion testimony. After receiving the letter, the prosecutor told Hiller's counsel that she did not believe that the letter comported with rule 9.02. The prosecutor asked for more information, but she never received any. The implied-consent hearing occurred on December 12. The prosecutor involved in the criminal matter did not attend the hearing.

On December 19, Hiller's counsel faxed a letter to the prosecutor asking the state's position on continuing the pretrial hearing until the implied-consent matter was resolved in mid-January. The state did not object, and on December 22, Hiller's counsel faxed a letter to the district court asking to continue the pretrial hearing until the implied-

consent matter was resolved. The court was on vacation through January 2, 2012. On January 3, the prosecutor emailed the court and asked whether it had reached a decision on Hiller's continuance request. On January 4, the court responded in an email. The court noted that the matter was almost six months old and indicated that it would not continue the pretrial hearing unless there is "a compelling reason to wait for a ruling in the [implied-consent] file." In an email, Hiller's counsel explained that

> [Hiller] presented a defense of post driving alcohol consumption at the implied consent hearing. While I cannot speak for the [c]ounty [a]ttorney, I believe the outcome of that hearing will likely play a significant role in the resolution of the criminal case. I doubt there will be any constructive discussion on the criminal case until the [implied-consent] issue is resolved.
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> Judicial economy, and saving the litigants a trip to court for an appearance which will not be productive, were my primary considerations in proposing the postponement.

The court did not grant a continuance.

On January 5, the prosecutor requested a transcript of the implied-consent hearing and learned that she would not receive a transcript before the pretrial hearing on January 10. The prosecutor requested a continuance on this basis, and the district court denied the request.

At the pretrial hearing on January 10, the prosecutor again requested a continuance, arguing that it was not possible to be prepared to meet Hiller's expert's testimony at trial because (1) Hiller's rule 9.02 disclosure was inadequate because it did not include information about the expert's qualifications or the basis for the expert's conclusions; and (2) she had not heard the expert's testimony at the implied-consent

hearing and a transcript of the testimony was not yet available. The prosecutor explained that she did not order a transcript immediately after the implied-consent hearing because Hiller had requested a continuance. Hiller's counsel did not object to a continuance.[1]

The district court denied a continuance, reasoning that (1) the criminal case had been pending since July; (2) the criminal matter "is not controlled by what happens in" implied-consent matters; and (3) "the delay in requesting a transcript is—was taking a chance that it would resolve without needing the transcript. And that is not a valid reason [to continue the case]."

On January 12, Hiller requested a continuance because his expert witness had a conflict, but on the morning of January 13, Hiller notified the court that his expert would be available. On January 13, at 1:52 p.m., the district court instructed court administration in an email to advise the parties that trial would commence on January 17. At 2:08 p.m., court administration advised the court in an email that the prosecutor's office had "called and said a dismissal will be down here in a flash dismissing the . . . Hiller case." The state filed a motion under Minn. R. Crim. P. 30.01 to dismiss the case without leave of court and identified the reason for the dismissal as "prosecutorial

[1] The state suggests that it did not request a continuance separate from Hiller's request when it states that "the record demonstrates that [Hiller] requested a continuance of the pretrial matter until after the implied consent case was decided. The state joined in the request for a continuance. The district court refused to grant the request for a continuance." This statement does not accurately reflect the record. The state separately requested a continuance on January 5, 2012, and again at the pretrial hearing on January 10.

discretion." Also on January 13, the state received a transcript of the implied-consent hearing.[2]

On February 9, the state filed a new complaint charging Hiller with second-degree DWI. On February 10, the district court dismissed the complaint sua sponte. The court found that the state's dismissal of the original complaint constituted "bad faith and an abuse of prosecutorial discretion." The court concluded that because the state's bad-faith dismissal unnecessarily delayed the trial, Hiller was entitled to dismissal under Minn. R. Crim. P. 30.02.

This appeal follows.

D E C I S I O N

When the state appeals a pretrial order, it must show clearly and unequivocally that (1) the ruling was erroneous and (2) the order will have a "critical impact" on its ability to prosecute the case. *State v. McLeod*, 705 N.W.2d 776, 784 (Minn. 2005). A district court's "dismissal of a charge clearly has a critical impact on the outcome of the trial." *State v. Poupard*, 471 N.W.2d 686, 689 (Minn. App. 1991). The district court's order dismissing the state's reissued complaint has critical impact on the state's ability to prosecute Hiller.

The state argues that the district court erred in dismissing the reissued criminal complaint under Minn. R. Crim. P. 30.02. The state frames this issue as one involving interpretation of the rules of criminal procedure and requiring de novo appellate review.

[2] The court's findings of fact 9 through 11 state that events occurred on January 14, but the record demonstrates that the events occurred on January 13.

But Minn. R. Crim. P. 30.02 states that a district court "may dismiss the complaint . . . if the prosecutor has unnecessarily delayed bringing the defendant to trial." Because the rule uses "may," the district court has discretion under the rule. *See State v. Gowan*, 298 Minn. 172, 177, 214 N.W.2d 228, 231 (1973) (interpreting "may" to mean "at the district court's discretion"). Therefore, we review a decision to dismiss for an abuse of discretion.[3] A district court's findings will be sustained on appeal unless they are clearly erroneous. *See State v. Underdahl*, 767 N.W.2d 677, 679, 686 (Minn. 2009) (considering whether district courts' findings in pretrial order were clearly erroneous).

In dismissing the state's reissued complaint sua sponte, the district court explained:

> 1. The state's blatant attempt to defeat this court's adverse ruling on its request for a continuance and to interfere with this court's scheduling of this matter for trial by dismissing and then re-charging an identical complaint constitutes bad faith and an abuse of prosecutorial discretion. "Rule 30.01 of the Rules of Criminal Procedure is not intended to give the prosecutor the right to effectuate a do-it-yourself continuance order." *State v. Blount*, 2009 WL 511898 (Minn. App. Mar. 3, 2009) (Ross, J., dissenting).
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> 2. Permitting the state to manipulate the scheduling of criminal matters for trial by use of Minn. R. Crim. P. 30.01 would result in manifest injustice to defendants and would disrupt this court's obligation to try cases in a timely manner.

[3] The state cites *State v. Borough*, 287 Minn. 482, 485-86, 178 N.W.2d 897, 899 (Minn. 1970), to support its assertion that "there must be a showing of prejudice before the district court's dismissal pursuant to Minnesota Rule of Criminal Procedure 30.02 will be upheld." But in *Borough*, the court considered whether an 18-month delay in bringing a defendant to trial violated his constitutional right to a speedy trial. 287 Minn. at 483-84, 178 N.W.2d at 898. There, Minn. R. Crim. P. 30.02 was not at issue. *Id.*

> 3. The state's attempt to circumvent this court's denial of its motion for continuance–if allowed to succeed–would result in an unjustified and unnecessary delay of the trial.
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> 4. [Hiller] is entitled to a dismissal of the complaint pursuant to Minn. R. Crim. P. 30.02.

The state argues that, in dismissing the first complaint and recharging Hiller, it properly exercised its discretion under Minn. R. Crim. P. 30.01 and did not act in bad faith. The state contends that "[t]here is no evidence to support the district court's claim that the dismissal and recharging were done in 'bad faith.'" We disagree.

Minn. R. Crim. P. 30.01 provides that a "prosecutor may dismiss a complaint or tab charge without the court's approval, and may dismiss an indictment with the court's approval. The prosecutor must state the reasons for the dismissal in writing or on the record." "A dismissal under rule 30.01 is without prejudice, and the state, provided it is not acting in bad faith, may 'later reindict based on the same or similar charges.'" *State v. Couture*, 587 N.W.2d 849, 853 (Minn. App. 1999) (involving state's dismissal of complaint and later recharging defendant) (quoting *State v. Pettee*, 538 N.W.2d 126, 131 n.5 (Minn. 1995) (involving state's dismissal of indictment and later reindictment of defendant)), *review denied* (Minn. Apr. 20, 1999). *Pettee* cited *United States v. Hayden*, 860 F.2d 1483, 1488 (9th Cir. 1988), for the proposition that "[a]lthough the state must first obtain leave of court to dismiss an indictment, when the state requests a dismissal in good faith, the court is generally duty bound to honor the request." 538 N.W.2d at 131 n.5.

The district court found that the state's dismissal of the first complaint and recharging with an identical complaint "constitute[d] bad faith and an abuse of prosecutorial discretion" and that the "state's attempt to circumvent [the district] court's denial of [the state's] motion for a continuance–if allowed to succeed–would result in an unjustified and unnecessary delay of the trial." These findings are not clearly erroneous.

The record shows that the prosecutor asked for a continuance in an email to the district court on January 5, 2012, because she could not get a copy of the transcript of the implied-consent hearing before the pretrial hearing, and the district court denied the request. At the pretrial hearing on January 10, the prosecutor again requested a continuance, stating that it was not possible to be prepared for trial because Hiller's rule 9.02 disclosure concerning his expert witness was inadequate and she did not yet have a transcript of the implied-consent hearing. But the implied-consent hearing occurred on December 12, 2011, and the prosecutor did not order a transcript until January 5, 2012. Also, Hiller submitted his rule 9.02 disclosure in August 2011 and provided the prosecutor with additional information about his expert's testimony in November 2011. The prosecutor asked Hiller's counsel for more information about Hiller's expert in November, but, when she did not receive the information, she did not bring the expert-witness issue to the district court's attention until the pretrial hearing.

Thus, the record shows that the state twice requested a continuance shortly before trial was scheduled to begin because it had not timely obtained necessary information to prepare to meet Hiller's expert's testimony, and the district court denied both requests. Then, within 16 minutes after the court's email instructing court administration to inform

the parties that Hiller's trial would commence on January 17, the prosecutor's office called court administration and said that a dismissal of the case would be filed in a "flash." The state dismissed the complaint and later filed an identical complaint. The only reason for the dismissal that the state provided was "prosecutorial discretion."

But prosecutorial discretion is the authority exercised when evaluating reasons for dismissal; it is not a reason to dismiss. The state did not provide any explanation for the dismissal that would support any other conclusion than that the state dismissed the first complaint because it was not prepared to go to trial when the district court denied its request for a continuance.

Because the district court's findings that the state's dismissal of the first complaint and recharging with an identical complaint "constitute[d] bad faith and an abuse of prosecutorial discretion" and, if permitted, would result in unjustified and unnecessary delay of Hiller's trial are not clearly erroneous, the district court did not abuse its discretion in dismissing the re-filed complaint against Hiller under rule 30.02.

Affirmed.