STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1194

State of Minnesota,
Respondent,

vs.

Terral D. McNutt,
Appellant.

Filed July 21, 2009
Affirmed
Worke, Judge

Ramsey County District Court
File No. 62-K4-06-003691

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

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, 50 West Kellogg Boulevard, Suite 315, St. Paul, MN 55102 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Jodie L. Carlson, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Worke, Presiding Judge; Minge, Judge; and Collins, Judge.[*]

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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 possession of a firearm by an ineligible person, fifth-degree controlled-substance crime, and fleeing police in a motor vehicle, arguing that (1) his constitutional right to a speedy trial was violated; (2) there is insufficient evidence to sustain his conviction of fifth-degree controlled-substance crime; and (3) the district court abused its discretion in denying his motion for a durational departure on the firearms conviction. We affirm.

FACTS

Appellant Terral D. McNutt stole a handgun from a friend's vehicle while it was parked in a gas station parking lot. The incident was reported to the police, who located appellant's vehicle and pursued him. Appellant fled from the police in his car and later on foot. When appellant was apprehended, the stolen handgun was found less than ten feet from him. Appellant was handcuffed, pat-searched, and transported to the hospital for medical attention. When appellant was removed from the squad, a clear plastic bag containing cocaine was found under the seat where appellant had been sitting.

Appellant was charged with possession of a firearm by an ineligible person, fifth-degree controlled-substance crime, and fleeing a peace officer in a motor vehicle. On October 9, 2006, appellant filed a written demand for a speedy trial. Appellant waived his right to a speedy trial on December 19, 2006. His jury trial began on February 19, 2008. Appellant was found guilty as charged. The district court sentenced appellant to 60 months in prison on the firearm conviction, a concurrent 21-month sentence for the

controlled-substance-crime conviction, and a concurrent 19-month sentence for the fleeing-police conviction. This appeal follows.

D E C I S I O N

Speedy Trial

Appellant argues that his convictions must be reversed because his constitutional 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).

Appellant concedes that he did not argue to the district court that his right to a speedy trial had been denied. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (holding that this court generally will not consider matters not argued and considered in the district court including constitutional questions of criminal procedure). However, this court may consider constitutional issues raised for the first time on appeal "in the interests of justice, when the parties have adequate briefing time, and when the issue is implied in the district court." *State v. Bradley*, 629 N.W.2d 462, 464 (Minn. App. 2001), *review denied* (Minn. Aug. 15, 2001). Even though appellant affirmatively waived his right to a speedy trial on December 19, 2006, a review of the relevant factors shows that no violation occurred.

"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

The length of delay functions as a "triggering mechanism" in the speedy-trial analysis in that until some delay is evident, "the other factors need not be considered." *State v. Jones*, 392 N.W.2d 224, 235 (Minn. 1986). In Minnesota, a delay over 60 days from the date a defendant demands a speedy trial is presumptively prejudicial, and requires further inquiry. *State v. Friberg*, 435 N.W.2d 509, 513 (Minn. 1989). Appellant filed a written speedy-trial demand on October 9, 2006, and a jury trial commenced on February 19, 2008. This delay of approximately 16-months raises the presumption that appellant's right to a speedy trial was violated.

Reason for the Delay

"The responsibility for an overburdened judicial system cannot . . . rest with the defendant." *Jones*, 392 N.W.2d at 235. However, "when the overall delay in bringing a case to trial is the result of the defendant's actions, there is no speedy trial violation." *State v. Johnson*, 498 N.W.2d 10, 16 (Minn. 1993). Appellant's trial date was continued numerous times between his speedy-trial demand and the commencement of his trial. Because the record does not fully disclose why appellant's trial was continued so many times, it is likely that the delay was caused by an overburdened judicial system. However, appellant also waived his right to a speedy trial and agreed to the continuances; therefore, this factor weighs against appellant's claim.

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—including the import of defense decisions to seek delays." *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.

It appears that appellant was aware of, participated in, and did not object to the continuances of his trial. Likewise, appellant apparently never raised concerns about his speedy-trial right. *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). Appellant's failure to object to the continuances and failure to reassert his right to a speedy trial weighs against his claim that his right was not vindicated.

Prejudice to Defendant

"The final prong of the *Barker* test is to determine whether [a defendant] suffered prejudice as a result of the delays." *Windish*, 590 N.W.2d at 318. This is the most important of the factors. *State v. Knox*, 311 Minn. 314, 328, 250 N.W.2d 147, 157 (1976). Appellant has the burden of showing that he was prejudiced by the delays. *State v. Miller*, 525 N.W.2d 576, 583 (Minn. App. 1994). In considering prejudice to a defendant, the supreme court has considered "three interests that are protected by the

right to a speedy trial: "(1) preventing oppressive pretrial incarceration; (2) minimizing the anxiety and concern of the accused; and (3) preventing the possibility that the defense will be impaired." *Windish*, 590 N.W.2d at 318. The defendant does not have to prove prejudice; it can be "suggested by likely harm to a defendant's case." *Id.*

Appellant has failed to show that he was prejudiced in any way by the delays in getting to trial. Appellant was released from custody shortly after making his demand and remained out of custody until he was sentenced—there were no incarceration concerns. Appellant also concedes that there is nothing in the record to show that he suffered unusual anxiety or concern as a result of his trial being postponed. *See State v. L'Italien*, 363 N.W.2d 490, 493 (Minn. App. 1985) (stating that pretrial anxiety is not a serious allegation of prejudice), *review denied* (Minn. Apr. 26, 1985). Further, while appellant argues that the delay impaired his defense and urges us to presume prejudice here, he fails to explain exactly how his defense was impaired.

After considering the relevant factors, we conclude that appellant's right to a speedy trial was not violated. While the first factor has been met because there was a delay, the remaining factors weigh against appellant's claim. Importantly, there is no evidence that appellant was prejudiced by the delay or that the delay impaired appellant's ability to mount a defense.

Sufficiency of the Evidence

Appellant next argues that there is insufficient evidence to support his conviction of fifth-degree controlled-substance crime based on the theory of constructive possession because appellant was pat-searched before being put in the squad car and his hands were

cuffed behind his back. This court's review of the sufficiency of the evidence "is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction," is sufficient to support the verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). An appellate court must assume that the fact-finder "believed the state's witnesses and disbelieved any contrary evidence." *State v. McKenzie*, 511 N.W.2d 14, 17 (Minn. 1994). "We will not disturb the verdict if the [fact-finder], acting with due regard for the presumption of innocence and [the requirement of] proof beyond a reasonable doubt, could reasonably conclude that [the] defendant was proven guilty of the offense charged." *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988). Circumstantial evidence is entitled to as much weight as other evidence. *Webb*, 440 N.W.2d at 430. "A conviction based upon circumstantial evidence merits stricter scrutiny." *State v. Walen*, 563 N.W.2d 742, 750 (Minn. 1997). But it will be upheld if the reasonable inferences drawn from the circumstantial evidence are consistent with guilt and inconsistent with any other rational hypothesis. *Id.*

Appellant was charged with fifth-degree controlled-substance crime. A person is guilty of possession of a controlled substance if he knows the nature of the substance and either physically or constructively possesses it. *State v. Florine*, 303 Minn. 103, 104, 226 N.W.2d 609, 610 (1975). If others had access to the location of the controlled substance, constructive possession may be proved if the evidence indicates a strong probability that the defendant exercised dominion and control over the area. *Id.* at 105, 226 N.W.2d at 611. This court looks at the totality of the circumstances in assessing whether

constructive possession has been established. *State v. Munoz*, 385 N.W.2d 373, 377 (Minn. App. 1986).

The officers who transported appellant testified that they searched the back seat of the squad car before their shift began that day and that appellant was the first person placed in the back seat since their shift began. The officers testified that a typical search involved removing the seats and the back cushions and checking the floor, back dash, and seat area of the entire back seat. Further, while a pat-search of appellant was conducted, the officers testified that the pat-search would not necessarily reveal any cocaine on appellant's person because the purpose of a pat-search is to check for weapons. Finally, the fact that appellant was handcuffed does not mean that his movement was completely restricted—people have been known to reach into their waistbands and pockets, or even move their hands from the back to the front while in handcuffs. Based on the officers' testimony and the totality of the circumstances, the inference is strong that appellant was the person who possessed the cocaine. Moreover, the officers' testimony that the back seat was searched at the start of their shift, that appellant was the first person in the back of the squad car that shift, and that the cocaine was not found until after appellant was transported, is sufficient to show that there was more than enough circumstantial evidence to convict appellant.

Sentencing Departure

Finally, appellant argues that the district court abused its discretion in denying his motion for a durational departure on the firearms conviction. We review a district court's decision not to depart from a presumptive sentence for an abuse of discretion, and it is a

"rare" case in which the district court's refusal to depart will warrant reversal. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

The district court may depart from the 60-month sentence only if it finds "substantial and compelling reasons" to do so. Minn. Stat. § 609.11, subd. 8(a) (2006). The fact that the district court is permitted to depart from the mandatory minimum sentence does not mean that it must. Appellant did not request a downward departure from the 60-month presumptive sentence, let alone provide the district court with any substantial and compelling reason to depart. The basis of appellant's argument regarding a durational departure apparently stems from a letter written to the court by appellant's fiancée, which was never made part of the record. Because appellant failed to request a downward departure or to present any basis for one, the district court did not abuse its discretion by declining to depart from the 60-month presumptive sentence.

Affirmed.