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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1038

State of Minnesota,
Respondent,

vs.

Leonard Deron Seamon,
Appellant.

Filed April 29, 2013
Affirmed
Cleary, Judge

Anoka County District Court
File No. 02-CR-09-8729

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

Anthony C. Palumbo, Anoka County Attorney, M. Katherine Doty, Assistant County Attorney, Anoka, Minnesota (for respondent)

Julie Loftus Nelson, Special Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Presiding Judge; Hooten, Judge; and Willis, Judge.[*]

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[*] Retired judge of the Minnesota Court of Appeals, serving 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

CLEARY, Judge

Appellant challenges his conviction of possession of a controlled substance under Minn. Stat. § 152.021, subd. 2(1) (2008), arguing that his conviction was not supported by sufficient evidence and that he was denied his constitutional right to a speedy trial. Appellant also submitted a pro se supplemental brief making several other arguments. We affirm.

FACTS

On July 16, 2009, Minneapolis police officer Kelly Kasel obtained a search warrant for an apartment in Fridley, as well as for the person of appellant Leonard Deron Seamon, based on information from a confidential informant (CI) that appellant had sold cocaine to the CI in the apartment. The Anoka Special Weapons and Tactics (SWAT) team executed the search warrant on the same day. As the SWAT team was gaining entry to the apartment building, Officer Kasel and another officer observing the outside of the building saw a screen drop out of one of the windows of the second-floor apartment. The officers then observed an African-American male's bare arm extend out of the window holding a plastic shopping bag and drop the bag to the ground. Neither officer observed any bracelets, rings, fingernails, or tattoos on the arm or fingers. Shortly after the bag was dropped, both officers also observed that a box of baking soda was thrown out of the window and landed on the ground below. There were only three individuals present in the apartment when the SWAT team entered. The individuals were appellant and two females, C.C. and L.Y.

Officer Kasel recovered the plastic bag and its contents from the ground outside the apartment building. The plastic bag contained six separate bags, some of which also contained more baggies. A chemist working for the City of Minneapolis conducted a chemical analysis of the contents of the bags. The chemist determined that five of the six bags in the plastic shopping bag contained varying amounts of cocaine. The first bag held ten baggies containing tan chunks of cocaine base weighing 2.21 grams, 5.99 grams, 2.91 grams, 2.96 grams, 6.10 grams, 5.96 grams, 3.01 grams, 3.02 grams, 2.94 grams, and 5.85 grams. The second bag held tan chunks of cocaine base weighing 26.20 grams. The third bag held two baggies containing white chunks of cocaine hydrochloride weighing 25.60 grams and 1.06 grams. The fourth bag held one baggie containing tan chunks of cocaine weighing 10.49 grams. The fifth bag held three baggies containing tan chunks of cocaine base weighing 5.79 grams, 5.86 grams, and 2.80 grams. The sixth bag contained 81.26 grams of marijuana.

Appellant was charged with two first-degree controlled-substance offenses in violation of Minn. Stat. § 152.021, subds. 1(1), 2(1) (2008). One of the charges was later amended from a sale crime under subdivision 1(1) to a possession crime under subdivision 2(1). Appellant had a separate second-degree controlled-substance charge pending against him at the same time, and he demanded a speedy trial in both matters during a hearing on March 23, 2011. A jury trial was held for the second-degree charge on April 5–6, 2011, and the jury found appellant guilty. Following the jury's verdict, appellant's counsel agreed to schedule the trial for this case on August 22, 2011.

Following a continuance, a bench trial was held on November 3–4, 2011. The district court found appellant not guilty of one count of first-degree controlled-substance possession with a firearm and guilty of one count of first-degree controlled-substance possession. This appeal followed.

D E C I S I O N

I.

Appellant argues that the evidence is insufficient to prove that he possessed the bag of drugs. When reviewing a challenge to the sufficiency of the evidence, the same standard of review applies to bench trials, in which the district court is the trier of fact, as to jury trials. *State v. Davis*, 595 N.W.2d 520, 525 (Minn. 1999). This court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the trier of fact to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We must assume that the trier of fact "believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). We will not disturb the verdict if the trier of fact, 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 guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004).

"While it warrants stricter scrutiny, circumstantial evidence is entitled to the same weight as direct evidence." *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999). The facts and circumstances disclosed by the circumstantial evidence must form a complete

chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt. *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994).

A person is guilty of a first-degree controlled substance crime if "the person unlawfully possesses one or more mixtures of a total weight of 25 grams or more containing cocaine, heroin, or methamphetamine." Minn. Stat. § 152.021, subd. 2(1). "[I]n order to convict a defendant of unlawful possession of a controlled substance, the state must prove that [the] defendant consciously possessed, either physically or constructively, the substance . . . ." *State v. Florine*, 303 Minn. 103, 104, 226 N.W.2d 609, 610 (1975).

> The purpose of the constructive-possession doctrine is to include within the possession statute those cases where the state cannot prove actual or physical possession at the time of arrest but where the inference is strong that the defendant at one time physically possessed the substance and did not abandon his possessory interest in the substance but rather continued to exercise dominion and control over it up to the time of the arrest.

Id. at 104–05, 226 N.W.2d at 610. The state can prove constructive possession by showing "that, if police found [the substance] in a place to which others had access, there is a strong probability (inferable from other evidence) that [the] defendant was at the time consciously exercising dominion and control over it." *Id.* at 105, 226 N.W.2d at 611.

It is undisputed that appellant, C.C., and L.Y. all had access to the apartment in question. At trial, Officer Kasel testified that she saw an African-American male's bare arm holding the bag and dropping it out of the window. She also testified that she was

certain that the arm she saw dropping the bag belonged to neither C.C. nor L.Y. The officer observing the apartment building with Officer Kasel also testified that she saw an African-American male's bare arm throw the bag out of the apartment window. She stated that she was certain that the arm did not belong to C.C. or L.Y.

Photographs of the arms of appellant, C.C. and L.Y., as they appeared when the SWAT team entered the apartment, were taken and produced at trial. Using the photographs as an illustration, Officer Kasel testified that C.C. was wearing a coat when the SWAT team entered the apartment, and Officer Kasel noted that she would have seen C.C.'s coat if C.C. had been the one to throw the plastic bag out of the window. Officer Kasel also testified that L.Y. had long, extended fingernails. She testified that there was color on the fingernails and that L.Y. had a bracelet on one hand and a tattoo on the other hand. When the SWAT team entered the apartment, appellant was wearing blue pants and a short-sleeved blue shirt, which are commonly referred to as scrubs. Again using the photographs as an illustration, Officer Kasel testified that there appeared to be a "white powdery substance" on the exterior of appellant's clothes. She also noted that appellant was wearing a gold watch or bracelet on his left wrist but that his right arm was bare. Finally, Officer Kasel testified that "without a doubt the arm that I saw come out the window and drop the shopping bag that contained narcotics was [appellant]."

The only reasonable inference that can be drawn from this evidence is that appellant was the person who dropped the bag of drugs and exercised dominion and control over it. Two officers testified that they observed a male arm holding the bag of drugs and then dropping it to the ground. Although the officers admitted that it was

possible that C.C. had time to put a long-sleeved jacket on before the SWAT team entered the apartment, they both testified that they saw a male arm, and we assume that the district court believed the state's witnesses and disbelieved any evidence to the contrary. *See Moore*, 438 N.W.2d at 108. When the SWAT team members entered the apartment almost simultaneous to the time the officers saw the male arm in the window, they found two females and only one male present. The only reasonable conclusion to draw is that the male arm that the officers saw holding the bag of drugs belonged to appellant.

Appellant also argues that the evidence is insufficient to prove that he lived in the apartment. It is not necessary to show that appellant lived in the apartment to prove him guilty of controlled-substance possession. The evidence is sufficient to prove that appellant constructively possessed the bag of drugs.

II.

Appellant also argues that he was denied his constitutional right to a speedy trial because he first asserted the right in March 2011, and his trial did not begin until November 2011. Whether a defendant's constitutional right to a speedy trial has been violated is a question of law subject to de novo review. *State v. Cham*, 680 N.W.2d 121, 124 (Minn. App. 2004), *review denied* (Minn. July 20, 2004). "In order to determine whether a delay in any given case constitutes a deprivation of the right to a speedy trial, courts are instructed to use the balancing test announced by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182 . . . (1972)." *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999). "The [*Barker*] test provides that a court must

consider: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted his or her right to a speedy trial; and (4) whether the delay prejudiced the defendant." *Id.* "None of the factors is 'either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant.'" *Id.* (quoting *Barker*, 407 U.S. at 533, 92 S. Ct. at 2193). "When the defendant's right to a speedy trial has been deprived, dismissal, while severe, is the remedy." *State v. Stitzel*, 351 N.W.2d 409, 410 (Minn. App. 1984).

Length of Delay

"A defendant must be tried as soon as possible after entry of a plea other than guilty. On demand of any party the trial must start within 60 days of the demand unless the court finds good cause for a later trial date." Minn. R. Crim. P. 11.09(b). "In Minnesota, a delay of more than 60 days from the date of the speedy-trial demand is presumptively prejudicial." *State v. Griffin*, 760 N.W.2d 336, 340 (Minn. App. 2009).

Appellant originally asserted his right to a speedy trial on March 23, but waived this demand when he agreed to a trial date of August 22. As discussed below, appellant reasserted his right to a speedy trial on August 10. His trial began on November 3, 85 days after his demand. A delay of more than 60 days prompts examination of the other *Barker* factors.

Reason for Delay

The state has the primary burden to ensure a speedy trial, and "different weights will be assigned to different reasons for delay." *Cham*, 680 N.W.2d at 125. "Deliberate

attempts at delay weigh heavily against the state." *State v. Hahn*, 799 N.W.2d 25, 30 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011). "Normally, the unavailability of a witness constitutes good cause for delay." *Windish*, 590 N.W.2d at 317 (citing *State v. Terry*, 295 N.W.2d 95, 96 (Minn. 1980)).

In *Windish*, the court noted that part of the delay in bringing the case to trial was attributable to the unavailability of the state's complaining witness. *Id.* The court noted that "a prosecutor must be diligent in attempting to make witnesses available and the unavailability must not prejudice the defendant." *Id.* The court determined that the state "did not produce any evidence of its efforts to ensure" the witness's appearance, and that the "lack of diligence weigh[ed] against the state." *Id.*

Appellant's trial was delayed when the court granted the state's motion for a continuance on August 10. The trial had been scheduled to start on August 22, but was delayed until October 31 because the state's forensic witness could not be located. During the hearing on August 10, the state explained:

> [T]he witness no longer works for the place that did the testing [of the controlled substances]. . . . [The testing place] would not provide us with her contact information or mailing address citing public privacy rules, but would only tell us she was unavailable as she was out of state until the end of September. They indicated they would pass on any subpoenas as they have passed on this one.
>
> Our investigators attempted to get an address so we can speak directly to the witness. We were unable to get an address. So the best information we have now is her subpoena address and the information from the former employer has spoken with her and has indicated she is out of state until the end of September.

In contrast to *Windish*, it appears here that the state was diligently trying to ensure the witness's availability for trial, but was having problems locating her.

The state's witness was available at the end of September, but the court did not schedule the trial until October 31 because there were "not a lot of available dates left in 2011." The Minnesota Supreme Court has held that "[w]here calendar congestion is the reason for delay, it weighs less heavily against the state than would deliberate attempts to delay trial." *State v. Friberg*, 435 N.W.2d 509, 513 (Minn. 1989) (citing *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192); *see also Griffin*, 760 N.W.2d at 340 (holding that "good cause for delay does not include calendar congestion unless exceptional circumstances exist").

Because the state sought a continuance due to the unavailability of its forensic witness, this factor does not weigh against the state and constitutes good cause for delay.

Assertion of Right to a Speedy Trial

Both parties agree that appellant asserted his right to a speedy trial on March 23. The parties disagree about whether appellant waived the right, and if he did waive the right, when he reasserted it.

"A defendant's assertion of the right to a speedy trial need not be formal or technical, and it is determined by the circumstances." *Hahn*, 799 N.W.2d at 32. A court can look for "any 'action whatever . . . that could be construed as the assertion of the speedy trial right.'" *Windish*, 590 N.W.2d at 317 (quoting *Barker*, 407 U.S. at 534, 92 S. Ct. at 2194).

Appellant asserted his right to a speedy trial in two pending matters on March 23. Following a trial on a separate charge, appellant waived his right when he agreed to schedule his trial for this case on August 22, which was beyond the 60-day deadline. This court has held that a defendant's acceptance of a trial date set beyond the 60-day deadline acts as a waiver of the right to a speedy trial. *See State v. Curtis*, 393 N.W.2d 10, 12 (Minn. App. 1986) (holding that "[b]y acceptance of the trial date set at the pretrial conference without objection, [the defendant] in effect waived his right to strict compliance with the 60-day rule").

Appellant claims that he reasserted his right on August 4, but the state argues that he did not reassert the right until October 19. During the hearing on August 4, the state moved to continue the trial from August 22 because its forensic witness was unavailable. Appellant objected to the motion. The court asked if appellant had made a speedy-trial demand in this case. Appellant stated that he had made the demand in March 2011, and the court noted that on April 6, appellant had agreed to schedule the matter for trial on August 22. The court denied the state's motion to continue the trial because the state did not have enough information about why the witness was unavailable, but the court told the state that it could bring the motion again once it had more information about the witness.

The state again moved for a continuance based on witness unavailability on August 10. Appellant objected stating, "The United States Constitution says I have the right to face my accusers and the trial was in demand for a speedy trial as of March 23,

2011. To push the trial date into September would be six months out . . . ." The court granted the motion, and trial was scheduled for October 31.

Appellant's statement on August 4, claiming that he had asserted his right to a speedy trial in March 2011, was insufficient to reassert the right. It was merely a response to a factual inquiry by the court regarding whether the right had ever been asserted. Although appellant stated that he asserted his right, the court followed with a discussion of the trial scheduling, and appellant did not indicate that he wanted to reassert the right. Appellant's statement on August 10, however, was a reassertion of that speedy-trial demand. As the court noted in *Windish*, we look for "any action whatever" that constitutes an assertion of the right. 590 N.W.2d at 317 (quotation omitted). It is clear, based on appellant's statement on August 10, that he was reasserting his right to a speedy trial.

Prejudice to Appellant

The final factor of the *Barker* test is to determine whether the defendant suffered prejudice as a result of the trial delay. *Id.* at 318. "Prejudice is measured in light of the interests that the speedy-trial right is designed to protect." *Hahn*, 799 N.W.2d at 32. The three interests that are protected by the right to a speedy trial are: "(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.

During the time appellant's trial was delayed, he was incarcerated for a separate conviction. When a defendant is incarcerated for an unrelated matter, the first two

prejudice interests are rendered moot. *See id.* (holding that the first two concerns regarding prejudice did not apply because the defendant was already in custody for another offense). Appellant argues that he suffered prejudice under the third interest because he was not represented by counsel. Appellant argues that if his "March 23rd demand for a speedy trial [had] been honored, then he would have had counsel representing him at his trial in this matter. . . . [G]enerally speaking, a defendant will fair [sic] better at a trial when represented by a trained attorney, rather than when representing himself."

Appellant was represented by privately-retained counsel when he waived his March demand for a speedy trial by agreeing to schedule trial for August 22. After that waiver, a breakdown in the relationship with his attorney occurred, and the attorney withdrew from representation on June 3. Appellant began representing himself at that point. It does not appear from the record that appellant sought representation during the time between the withdrawal of his privately-retained counsel and the hearings held in August.

Even if appellant's reasserted speedy-trial demand had been honored, it is unlikely that he would have had counsel at trial. During a pretrial hearing on October 19, the court warned appellant about the disadvantages of self-representation and offered to give him time to apply for a public defender. Appellant stated, "I'd rather be more in control of the court trial procedure," and he chose to proceed pro se. Because appellant had the option of being represented by a public defender throughout the pendency of the charges, the 25-day delay did not affect his decision about representing himself.

In light of the analysis of the *Barker* factors, it does not appear that the 25-day delay complained of was a violation of appellant's constitutional right to a speedy trial.

III.

Appellant also submitted a pro se supplemental brief arguing that his due-process rights were violated; that the district court did not have personal jurisdiction; that the district court failed to comply with the Minnesota Rules of Criminal Procedure; that his right against double jeopardy was violated; that there was no probable cause to support the search warrant; that the district court erred by refusing to compel disclosure of the confidential informant's identity; that the evidence is insufficient to support his conviction; and that his sentence was unlawful. After a thorough review of the issues raised by appellant, we conclude that his arguments are without merit.

Affirmed.