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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1433

State of Minnesota,
Respondent,

vs.

Mark A. Peterson,
Appellant.

Filed October 21, 2008
Affirmed
Ross, Judge

Polk County District Court
File No. CR-06-5028

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

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Lawrence Hammerling, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Huspeni, Judge.[*]

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[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

ROSS, Judge

Appealing from his conviction of fifth-degree possession of a controlled substance, Mark Peterson contests the district court's jury instruction on the elements of constructive possession. Peterson argues that the district court erred when it defined constructive possession in the jury instructions as a "strong probability, inferable from other evidence that the person knowingly exercised dominion and control over [the object] at the time." He also raises four challenges to his conviction in a separate pro se brief. Because the jury instructions as a whole accurately state the law and because we are not persuaded to reverse by Peterson's pro se arguments, we affirm.

DECISION

This appeal arises from Mark Peterson's conviction for fifth-degree possession of methamphetamine. On August 28, 2005, after receiving a tip from Peterson's estranged wife that he had sold methamphetamine, police obtained and executed a warrant to search the residence where Peterson was living with his mother. Officers discovered a glass pipe containing methamphetamine residue in the bedroom where they also found Peterson. The state charged Peterson with fifth-degree possession of a controlled substance and a jury found him guilty. Peterson raises several challenges to his conviction in this appeal.

I

Mark Peterson contends that he is entitled to a new trial because the district court erroneously instructed the jury on constructive possession. District courts have

considerable latitude when giving jury instructions. *State v. Mahkuk*, 736 N.W.2d 675, 681 (Minn. 2007). An instruction is in error if it materially misstates the law. *Id.* at 682. Even if it is erroneous, this court will not reverse a conviction if the erroneous instruction was harmless. *State v. Hall*, 722 N.W.2d 472, 477 (Minn. 2006). We will find an erroneous jury instruction to be harmless if we conclude beyond a reasonable doubt that the error had no significant impact on the verdict rendered. *Id.*

Peterson challenges the district court's jury instruction on the elements of fifth-degree controlled substance crime. He argues that the court should have used the model jury instruction from 10A *Minnesota Practice*, CRIMJIG 20.36 (2006) to define constructive possession:

> The elements of possession of a controlled substance in the fifth degree are:
>
> First, the defendant unlawfully possessed one or more mixtures containing __________.
> [In order to find that defendant possessed _________, it is not necessary that it was on the defendant's person. The defendant possessed __________ if it was in a place under the defendant's exclusive control to which other people did not normally have access, or if the defendant knowingly exercised dominion and control over it.]

Instead of following the model, the district court gave the state's proposed jury instruction, which follows:

> First, the defendant unlawfully possessed one or more mixtures containing methamphetamine. In order to find the defendant possessed methamphetamine, it is not necessary that it was on the defendant's person. *A person can constructively possess something if it was found in a place under the person's exclusive control to which other people ordinarily did not have access, or if found in a place to which other persons did have such access, there is a strong probability, inferable from other evidence, that the person knowingly exercised dominion and control over it at the time.*

(emphasis added).

The district court is not required to use model jury instructions. *State v. Smith*, 674 N.W.2d 398, 401 (Minn. 2004). Whether the instruction given is model or not, it must fairly and adequately explain the law. *State v. Flores*, 418 N.W.2d 150, 155–56 (Minn. 1988). We examine the challenged jury instruction here to determine whether it fairly and adequately explained the law.

The district court's definition of constructive possession comes from *State v. Florine*, 303 Minn. 103, 105, 226 N.W.2d 609, 611 (1975). In *Florine*, the supreme court addressed the appellant's claim of insufficiency of evidence to prove constructive possession of cocaine. *Id.* at 104, 226 N.W.2d at 610. The *Florine* court stated that in order to prove constructive possession, the state must show:

> (a) That the police found the substance in a place under defendant's exclusive control to which other people did not normally have access, or
> (b) that, if police found it in a place to which others had access, there is a strong probability (inferable from other evidence) that defendant was at the time consciously exercising dominion and control over it.

Id. at 105, 226 N.W.2d at 611.

The *Florine* definition of constructive possession states the law. It addresses those cases where the state cannot directly prove actual or physical possession at the time of the arrest but there is a strong inference that the defendant physically possessed the substance and did not abandon his possessory interest in it. *Id.* at 104–05, 226 N.W.2d at 610. This definition has been referenced consistently and favorably in appellate decisions. *See, e.g., State v. Porter*, 674 N.W.2d 424, 427 (Minn. App. 2004) (using *Florine* definition of

constructive possession); *Comm'r of Revenue v. Fort*, 479 N.W.2d 43, 46 (Minn. 1992) (explaining criminal constructive-possession definition); *State v. Smith*, 619 N.W.2d 766, 770 (Minn. App. 2000) (using *Florine* definition of constructive possession), *review denied* (Minn. Jan. 16, 2001).

We are not persuaded by Peterson's argument that the use of the phrase "strong probability" dilutes the state's burden of proof. The jury instructions, considered as a whole, accurately state that the elements of the crime must be proven beyond a reasonable doubt. Additionally, the jury instruction did not result in an impermissible inference. Generally, jury instructions advising that a particular fact may be inferred from particular facts, if proved, should be avoided. *State v. Olson*, 482 N.W.2d 212, 215 (Minn. 1992). But by its nature, the constructive-possession doctrine is an exception to this approach. It allows the jury to infer possession based on a series of facts that demonstrate a strong probability of possession. "Essentially, the constructive possession doctrine permits a conviction where the state cannot prove actual possession, but the inference is strong that the defendant physically possessed the item at one time and did not abandon his possessory interest in it." *Smith*, 619 N.W.2d at 770. This does not invite conviction for less than proof beyond a reasonable doubt; rather, it allows possession to be proven by circumstantial evidence. The jury instruction was not erroneous.

II

Peterson filed a pro se supplemental brief arguing that the district court erred by denying his motion to suppress evidence because the search warrant had expired before it

was executed. The warrant authorizes a search between 7:00 a.m. and 8:00 p.m. on August 28, 2005, but the warrant was not executed until 8:13 p.m.

Minnesota law generally requires search warrants to be executed between 7:00 a.m. and 8:00 p.m. Minn. Stat. § 626.14 (2006). The purpose of this requirement is to protect the public from the "abrasiveness of official intrusions" during the night. *State v. Stephenson*, 310 Minn. 229, 233, 245 N.W.2d 621, 624 (1976) (citation omitted). Failure to comply may be grounds for suppression of evidence. *State v. Alt*, 469 N.W.2d 732, 734 (Minn. App. 1991). Despite the 13-minute tardiness, there are no grounds to reverse the district court's decision not to suppress the evidence. Police executed the warrant less than 15 minutes after the authorized time. Sunset was not until 8:12 p.m., one minute before the search, and the supreme court's concern about the "abrasiveness of official intrusions" during the night does not apply. The district court did not err by denying the motion to suppress evidence for the statutory violation. *See State v. Goodwin*, 686 N.W.2d 40, 44 (Minn. App. 2004) (stating that district court is not obliged to suppress evidence for technical violation of daytime warrant statute), *review denied* (Minn. Dec. 14, 2004).

III

Peterson next argues that his conviction must be reversed because the district court violated the Uniform Mandatory Disposition of Detainers Act (UMDDA) and he was denied his right to a speedy trial. Under the UMDDA, an incarcerated person "may request final disposition of any untried indictment or complaint pending against the person in this state." Minn. Stat. § 629.292, subd. 1 (2006). The prisoner must deliver

the request to the commissioner of corrections or other official, who must then forward it to the court and the prosecuting attorney. *Id.*, subd. 2 (2006). The prisoner is then entitled to a trial within six months. *Id.*, subd. 3 (2006). Failure to try the case within six months may lead to dismissal. *Id.*

Peterson moved to dismiss the possession charge on March 14, 2007, under the UMDDA. The prosecutor claimed that he had never received a request for disposition, maintaining that Peterson had filed a request for disposition only on the unrelated charge. The request lists a different charge but not fifth-degree possession of methamphetamine. Peterson's attorney therefore withdrew the motion.

But at a hearing on April 2, 2007, Peterson's attorney argued that the complaint should be dismissed because he interpreted Peterson's August 2006 request for disposition on a separate charge to include a request regarding all untried indictments or complaints. He noted that the request states, "I hereby agree that this request will operate as a request for final disposition of all untried indictments, information or complaints on the basis of which detainers have been lodged against me from this your state." The prosecutor argued that the withdrawn motion could not be resurrected, and the district court denied Peterson's motion to dismiss.

We agree that Peterson's request for a final disposition was comprehensive. But the six-month statutory time limit under the UMDDA may be tolled when the defendant causes or creates the delay. *State v. Wilson*, 632 N.W.2d 225, 230 (Minn. 2001); *State v. Kurz*, 685 N.W.2d 447, 450 (Minn. App. 2004), *review denied* (Minn. Oct. 27, 2004). Peterson created such a delay. On April 28, 2006, Peterson made a speedy trial demand.

But on May 16, 2006, he filed a motion to suppress evidence and to dismiss the charges. The district court judge recused himself, and the omnibus hearing was continued twice, eventually to occur on August 14. Peterson failed to appear at the August 14 hearing, and it was finally held on November 7, 2006. The district court permitted the parties to submit briefs on the motions, with Peterson's brief due on December 15. Less than 90 days later, on March 5, 2007, the district court denied the motions, and the matter could only then be tried.

Because the six-month period under the UMDDA was tolled until March 5, 2007 while the district court considered Peterson's motions to suppress and dismiss, this period is excluded and the exclusion results in our decision that Peterson was not denied his right to a speedy trial based on the claim that the district court violated the UMDDA.

IV

Peterson also challenges the sufficiency of the evidence to support his conviction for fifth-degree possession of methamphetamine. He contends that the drugs and paraphernalia belonged to his wife. The reviewing court does not retry the facts but instead reviews the evidence in the light most favorable to the jury's verdict. *State v. Steinbuch*, 514 N.W.2d 793, 799 (Minn. 1994). The evidence, taken in the light most favorable to the jury's verdict, supports the jury's conclusion that Peterson possessed the methamphetamine.

A person is guilty of fifth-degree possession of a controlled substance when he "unlawfully possesses one or more mixtures containing a controlled substance classified in schedule I, II, III, or IV." Minn. Stat. § 152.025, subd. 2(1) (2006).

Methamphetamine is a schedule II controlled substance. Minn. Stat. § 152.02, subd. 3(3)(b) (2006). To establish possession, the state must prove that the defendant consciously possessed the substance and had actual knowledge of its nature. *Florine*, 303 Minn. at 104, 226 N.W.2d at 610. Constructive possession may be proven with evidence that police found the substance in a place where there is a strong probability, inferable from other evidence, that the defendant consciously exercised dominion and control over it. *Id*. at 105, 226 N.W.2d at 611.

The evidence supports the jury's conclusion that Peterson unlawfully possessed methamphetamine. An officer testified that he saw Peterson run into a bedroom when police knocked. Police entered that room and found a glass pipe and a strip of aluminum foil commonly used to smoke methamphetamine. A forensic scientist testified that the glass pipe contained methamphetamine residue. Peterson told an officer he had been staying in the bedroom for three weeks. Peterson's mother testified that Peterson had been staying in the room and that the pipe and other paraphernalia were not hers. The evidence supports the guilty verdict.

V

Peterson contends also that he received ineffective assistance of counsel. To establish ineffective assistance of counsel that violated his constitutional rights, Peterson must show that his attorney's representation fell below an objective standard of reasonableness, and that, but for the errors, the result would have been different. *Hathaway v. State*, 741 N.W.2d 875, 879 (Minn. 2007). This allegation faces the strong presumption that his counsel's performance fell within a wide range of reasonable

assistance. *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007). This court may address the two parts of the test in any order and may dispose of the claim on one without analyzing the other. *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006).

Peterson argues that his attorney's representation fell below an objective standard of reasonableness because he was unwilling to subpoena Peterson's wife. Peterson asserts that he would have been able to prove that his wife was lying when she gave the officers the tip that led to the search warrant, claiming that Peterson sold methamphetamine. Appellate courts do not review trial tactics or strategy for competency. *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999). An attorney's decision whether to call a witness is a matter of trial strategy, and Peterson's disagreement with his attorney about calling his wife as a witness does not constitute ineffective assistance of counsel. *Leake v. State*, 737 N.W.2d 531, 539 (Minn. 2007). We note that the strategy would seem to be objectively counterproductive. The trial proof that Peterson possessed methamphetamine was physical evidence uncovered during the search, not the allegedly false representation that led to the search. Because this court will not review the defense counsel's trial strategy and Peterson has not established that his counsel's performance was deficient, we are not convinced by Peterson's claim of ineffective assistance of counsel.

Affirmed.