STATE OF MINNESOTA
IN COURT OF APPEALS
A11-107

State of Minnesota,
Respondent,

vs.

Christopher Michael Clark,
Appellant.

Filed January 23, 2012
Affirmed
Minge, Judge

Anoka County District Court
File No. 02-CR-10-2460

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

Anthony C. Palumbo, Anoka County Attorney, Kathryn M. Timm, Assistant County Attorney, Anoka, Minnesota (for respondent)

Christopher Michael Clark, Minneapolis, Minnesota (pro se appellant)

Considered and decided by Minge, Presiding Judge; Ross, Judge; and Huspeni, Judge.*

* 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

MINGE, Judge

Appellant challenges a pretrial order setting conditions of pretrial release. Although appellant has since been tried, a special-term panel of this court concluded that the issues raised are "capable of repetition yet evading review" and therefore declined to dismiss the appeal as moot. We affirm the district court's order.

FACTS

Appellant Christopher Clark was arrested in Coon Rapids at 1:37 a.m. on Saturday, March 27, 2010, following a traffic stop. Incident to the stop, officers searched Clark's car and located equipment and ingredients for manufacturing methamphetamine. A "Judicial Determination of Probable Cause" was signed on Sunday, March 28, 2010, at 11:31 a.m., by a district court judge in Anoka County. However, the determination does not specify the offense.

On Tuesday, March 30, the case was called before another judge in circumstances that are confused. The March 30 district court transcript does not indicate whether Clark was present. In a subsequent statement, the bailiff indicated that Clark's case had been on the March 30 morning calendar and that the county attorney said Clark would be released. The bailiff added that it was possible that Clark was still in custody. In the record of March 30 district court activity, the court stated that it had the criminal complaint, although the prosecutor appearing on the case said that he did not, and the matter was stricken from the calendar.

The district court records for the following day, Wednesday, March 31, indicate that Clark was in the courtroom for a group advisory of defendants' rights. When Clark's case was called, the district court stated it was signing an order appointing the public defender. Clark agreed that he had been given a copy of the complaint, and the district court explained the charges. The public defender representing Clark requested a second appearance hearing pursuant to Minn. R. Crim. P. 8.01−.05. The prosecutor, citing Clark's recent move from Louisiana, requested $50,000 bail without nonmonetary conditions, or $25,000 with the conditions that Clark not use chemical substances and submit to random testing. The district court set bail in the alternative with Clark having the option to select which he would try to meet.

On August 17, 2010, Clark's bail was increased, with the condition of random urinalysis (UA) testing retained. This increase was based on Clark's testing positive in a UA on July 23. His bail was later increased to $75,000 without conditions or $45,000 with nonmonetary conditions, including UA testing. Clark appeals.

D E C I S I O N

1. 36-hour rule

Clark argues that the prosecutor deliberately evaded the 36-hour rule by holding him until Tuesday, March 30, just before the 36-hour period expired, then "releasing" him only to a holding cell until an arrest warrant was issued. Clark argues that he was held in jail until March 31 and that the prosecution delayed bringing him to court for

arraignment because it wanted to obtain a warrant to search his storage locker for drugs or drug paraphernalia before he was released.[1]

The applicable rule provides:

> An arrested person who is not released under this rule or Rule 6, must be brought before the nearest available judge of the county where the alleged offense occurred. The defendant must be brought before a judge without unnecessary delay, and not more than 36 hours after the arrest, exclusive of the day of arrest, Sundays, and legal holidays, or as soon as a judge is available.

Minn. R. Crim. P. 4.02, subd. 5(1). The rule requires that the complaint be presented to the judge before this appearance. *Id.*, subd. 5(2).

Under the rule, the day of Clark's arrest, Saturday, March 27, would have been excluded, as well as the next day, Sunday, March 28. The 24 hours comprising Monday, March 29, passed without Clark being brought before a judge. Thus, the 36 hours would expire at noon on Tuesday, March 30. Clark's case was called on March 30, although there is no indication in the transcript that Clark was present. The bailiff stated that Clark "was on this morning's jail calendar" and was to be released. The transcript does not indicate the time when Clark's case was called and when this discussion occurred.

Clark claims that he was not effectively released on March 30 because he was placed in a holding cell. A perfunctory release and immediate re-arrest would violate the 36-hour rule. *Cf. State v. Kasper*, 411 N.W.2d 182, 184−185 (Minn. 1987) (holding that speedy-trial "clock" was not restarted when the state dismissed and refiled the

[1] The probable-cause portion of the complaint dated March 30 notes that police were "executing a search warrant for [Clark's] storage unit." It is undisputed that no evidence was recovered from the storage unit.

complaint). But the record in this appeal does not include Anoka County jail records indicating exactly what occurred. The district court found that Clark was released in compliance with the 36-hour rule. That conclusion is implicitly based on factual determinations, which this court will not reverse absent clear error. *State v. Critt*, 554 N.W.2d 93, 95 (Minn. App. 1996), *review denied* (Minn. Nov. 20, 1996).

2. Remedy for Possible Violation

Assuming that the prosecution and the jail simply effected a technical release, that Clark was kept in a holding cell, and that Clark has shown a violation of the 36-hour rule; we will address the remedy question. As a remedy, Clark seeks retroactive cancellation of the conditions of release (in particular the random-UA requirement) and reversal of the consequences for his violations of the requirement. This requirement was first imposed at the March 31 hearing, which, if he had not been released on March 30, was beyond the 36-hour period. Clark argues that if he had been released without conditions on March 31, he would not have been subject to a random-UA requirement. But even if Clark had been released without conditions on March 31, that would not have prevented the district court from imposing bail and nonmonetary conditions later. And given the drug-related nature of the charged offense, the nonmonetary conditions could have included random urinalysis. *See State v. Martin*, 743 N.W.2d 261, 266−67 (Minn. 2008) (acknowledging that defendant's overdose was a factor supporting the imposition of a random-urinalysis condition but holding that it should not have been imposed simply because it was "standard practice").

Clark's proposed remedy of retroactive cancellation of the conditions of Clark's pretrial release is too broad. Release from custody, the most logical remedy, can no longer be provided. And there is no showing that *extended* pretrial release without any conditions is an appropriate remedy for a brief detention past the 36-hour deadline.

Clark tested positive for methamphetamines or amphetamines in July and November of 2010, four months and eight months, respectively, after any 36-hour violation. An adequate remedy for this rule violation would have been a release with a summons to appear on a later date, at which time conditions of pretrial release could be set. This appearance would have been scheduled for a date well before Clark's violations occurred.

3. Random UA as Improper Search or Seizure

Clark also argues that the random-UA condition of his pretrial release was an unreasonable search or seizure. The district court has discretion to determine the amount of bail as well as the conditions of pretrial release appropriate in a particular case. *See Martin*, 743 N.W.2d at 265 (reviewing setting of amount of bail). The supreme court in *Martin* disapproved of imposing random UAs as a "standard practice" because the rule requires that in setting release conditions the court "'take into account the nature and circumstances of the offense charged.'" *Id.* at 267 (quoting Minn. R. Crim. P. 6.02, subd. 2(a)). The *Martin* court did not suggest that the Fourth Amendment is implicated by an order requiring random UAs.

Clark cites two federal cases in which a requirement of UA testing as a condition of pretrial release has been rejected based, at least in part, on constitutional grounds. *See*

United States v. Scott, 450 F.3d 863, 870−71 (9th Cir. 2006) (rejecting state's argument that requirement of mandatory, random drug testing was justified by the "special needs" doctrine because there was no showing it was reasonable based on a connection between drug use and nonappearance in court); *Berry v. Dist. of Columbia*, 833 F.2d 1031, 1034 (D.C. Cir. 1987) ("Mandatory urinalysis clearly implicates rights secured under the Fourth Amendment."). The D.C. Circuit in *Berry* remanded for development of a record to establish, among other things, whether "there is *in fact* a positive correlation between drug use and pretrial criminality or non-appearance." 833 F.2d at 1035.

We recognize that under the Fourth Amendment, a search is only permissible if a warrant is obtained and that a UA condition has a search quality. *See Ellingson v. Comm'r of Pub. Safety*, 800 N.W.2d 805, 807 (Minn. App. 2011) (noting that collection of urine sample is a search subject to the warrant requirement), *review denied* (Minn. Aug. 24, 2011). The purpose of the constitutional warrant requirement is to ensure that a neutral magistrate, rather than police officers engaged in the investigation of crime, make determinations that citizens should be searched. *See State v. Mohs*, 743 N.W.2d 607, 611 (Minn. 2008) (holding that the purpose of the warrant requirement "is served by the requirement that law enforcement officers obtain from an impartial magistrate a warrant authorizing the particular search or seizure"). But when the district court has itself issued an order directing the search or seizure, the warrant requirement is, in essence, satisfied. *See id.* at 612−13 (holding that bench warrant for defendant's arrest that was based on the court's personal knowledge rather than "oath or affirmation" did not violate the Fourth Amendment).

The supreme court in *Martin* conceded that it was a "close question" whether random-UA testing should have been imposed as a condition for the release of a defendant who had been found by police in the middle of a drug overdose. 743 N.W.2d at 266. The court noted that Martin was not arrested at the time of his overdose, that he was not charged for a month, and that he did not make his first appearance until another month had passed. *Id.* The court also noted that Martin made his scheduled first appearance and that there was no indication that he had a criminal history or committed an offense between the overdose and his first appearance. *Id.*

Here, Clark was charged with possessing precursors for the manufacture of methamphetamine, and, when they arrested him, the officers noted that Clark "appeared to be very nervous, his hands were shaking, he was very twitchy and needed to constantly shuffle and shift around." Thus, as in *Martin*, Clark's condition indicated the ingesting of drugs. Unlike *Martin*, the bail evaluation noted that Clark had a prior drug-related offense, a 1998 Louisiana felony drug conviction. This is an indication of a history of drug offenses. Also, we note that Martin was offense-free for several months before being charged and having a UA requirement imposed on him. *Martin*, 743 N.W.2d at 266. The complaint against Clark was filed and UA conditions were set just three days after the arrest. There was no period of offense-free living in the community to assure the district court that a less restrictive condition of release would be adequate. Finally, in *Martin*, it appears UAs were standard practice. *Id.* at 267. Although Clark claims that random-UA testing is "standard practice" for drug cases in Anoka County, he does not substantiate this claim.

We conclude that because this record includes circumstances justifying a random-UA requirement even if Clark was arrested only for a precursor offense, the district court did not abuse its discretion in making random-UA testing a condition of Clark's release.[2]

Affirmed.

Dated:

[2] In his brief, Clark argues that random-UA conditions are used to coerce guilty pleas and that they constitute cruel and unusual punishment. Because these arguments are not supported by reference to legal authority or analysis, we do not consider them. *State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002).