**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A08-2102**

State of Minnesota,
Respondent,

vs.

James Raymond Cornwell,
Appellant.

**Filed December 8, 2009**
**Affirmed**
**Bjorkman, Judge**

Ramsey County District Court
File No. 62-K1-07-3254

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

Susan Gaertner, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, 50 Kellogg Boulevard West, Suite 315, St. Paul, MN 55102 (for respondent)

Marie L. Wolf, Interim 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 Klaphake, Presiding Judge; Halbrooks, Judge; and Bjorkman, Judge.

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

**BJORKMAN**, Judge

Appellant challenges his conviction of first-degree possession of a controlled substance, arguing that an 18-month precharge delay violated his right to due process. Appellant also contends that the district court erred by admitting evidence of a large quantity of methamphetamine seized during his arrest. Because appellant did not demonstrate that the precharge delay was attributable to the state's improper motive and because exigent circumstances justified the seizure of the methamphetamine, we affirm.

## FACTS

On February 28, 2006, appellant James Raymond Cornwell was arrested by the Maplewood Police Department on outstanding felony drug and misdemeanor driving warrants. The Department dispatched Maplewood Police Officers Bierdeman and Abel to appellant's last known residence to make the arrest. Before the arrest, the officers viewed appellant's driver's license photograph to familiarize themselves with his appearance.

Upon arrival at the residence, Officer Abel positioned himself at the front door, while Officer Bierdeman went to a patio door at the back of the house. Officer Abel knocked on the front door. There was no answer, but he observed movement in the house, and the front door opened slightly before being quickly closed. Officer Abel saw the blinds on a window next to the door go up; he saw appellant through the opening.

From the patio, Officer Bierdeman noticed someone moving behind a window located on the second floor above the patio door. Looking upward, he could see the

silhouette of someone in the room projected on the drawn shades. The silhouette appeared to be bending over and moving quickly.

Officer Bierdeman knocked on the patio door, and appellant's girlfriend answered the door. She claimed that no one else was home. Officer Bierdeman told her what he had seen through the upstairs window; she claimed that she did not know what was going on up there. Over her protests, Officer Bierdeman entered the home and began moving toward the stairway leading to the second floor. He was followed quickly by Officer Abel, who entered the home through the front door.

The two officers called for appellant to come down the stairs, but he did not respond. They could hear shuffling sounds coming from upstairs and noises that sounded like "drawers being shut and opened." They began to move up the stairs. When they reached the top of the stairs, Officer Bierdeman was able to see into a bedroom from which the noises had come, and he observed the shadow of someone in the room. The officers once again called for appellant to come out. He refused. Because the officers did not know if others were in the home or what appellant was doing, Officer Bierdeman contacted the police dispatch, telling them to keep an emergency channel open. Both officers then drew their weapon, and moved to the doorway of the bedroom. From the doorway, the officers could see that appellant was inside the bedroom.

As they entered the bedroom, the officers saw appellant standing next to a dresser. Officer Bierdeman estimated that appellant was two feet from the dresser. Officer Abel recalled that appellant may have been as far as five feet from the dresser. Both officers observed small plastic bags, some of which contained a crystalline substance, and two

glass pipes of the type commonly used for smoking methamphetamine, on top of the dresser.

Officer Bierdeman approached appellant, began to secure him, and handed him over to Officer Abel to be handcuffed. Officer Bierdeman then began searching the bedroom for any other person or weapons that could pose a threat to the officers. When he began opening the dresser drawers, appellant told him to stop, saying that the dresser contained his girlfriend's dirty underwear. As Officer Bierdeman continued to search the dresser, appellant yelled "hide the stuff, hide the stuff."

While searching the dresser, Officer Bierdeman noticed a small black zippered eyeglass case in the top drawer of the dresser. He opened it and found two small baggies containing a large amount of what appeared to be methamphetamine. Along with the eyeglass case was a digital scale, of the kind commonly used to weigh and measure drugs. Appellant initially denied any knowledge of the methamphetamine, but when the officers told him that they would have to arrest everyone in the house, he admitted that the drugs were his and that he had recently purchased them.

On September 12, 2007, appellant was charged with one count of first-degree possession of a controlled substance in violation of Minn. Stat. § 152.021, subd. 2(1) (2006) (possession of 25 grams or more of methamphetamine). The district court conducted a contested omnibus hearing on May 2, 2008. Appellant argued that the prosecution unduly delayed issuing the complaint and that he was prejudiced by the delay because an intervening conviction resulted in another criminal-history point and a longer

presumptive sentence for this controlled-substance offense.[1] Appellant also argued that the search of the dresser drawer and eyeglass case was an impermissible warrantless search and that the methamphetamine found in the eyeglass case should be suppressed. The district court denied both motions.

On May 21, 2008, appellant entered a *Lothenbach* plea, preserving his pretrial issues for appeal.[2] The district court found appellant guilty as charged and sentenced him to 102 months' imprisonment. This appeal follows.

## D E C I S I O N

### 1. The district court did not err by denying appellant's motion to dismiss based on precharge delay.

Appellant contends that his sentence violates his right to due process because the state's 18-month charging delay was intentional and resulted in a longer sentence. Whether precharge delay violates due process presents a legal question that we review de novo. *State v. Griffin*, 760 N.W.2d 336, 339 (Minn. App. 2009). Precharge delay warrants dismissal on due-process grounds if (1) the delay substantially prejudiced the defendant's right to a fair trial by impeding the defendant's ability to mount an effective defense at trial and (2) the government delayed charging the defendant in order to gain a tactical advantage. *United States v. Marion*, 404 U.S. 307, 324, 92 S. Ct. 455, 465

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[1] The additional criminal-history point increased appellant's presumptive guideline sentence from 98 to 110 months.

[2] *See State v. Lothenbach*, 296 N.W.2d 854, 857 (Minn. 1980) (allowing a defendant to stipulate to the state's case, try the case to the court, and preserve any pretrial issues for appeal); *see also* Minn. R. Crim. P. 26.01, subd. 3 (codifying the stipulated-facts procedure from *Lothenbach*).

(1971); *see also State v. Klindt*, 400 N.W.2d 127, 129–30 (Minn. App. 1987) (applying this two-prong test). The burden is on the defendant to demonstrate that both of these elements are met. *State v. Hanson*, 285 N.W.2d 487, 489 (Minn. 1979).

Appellant cites no controlling authority for the proposition that precharge delay that impacts sentencing constitutes substantial prejudice. *Marion* does not define prejudice in such terms. As we observed in *Klindt*, the prejudice needed to sustain dismissal on due-process grounds relates to the defendant's ability to effectively defend himself at trial. *Klindt*, 400 N.W.2d at 129. More recently, this court noted in *State v. Lussier*, 695 N.W.2d 651, 654-55 (Minn. App. 2005), *review denied* (Minn. July 19, 2005), that courts in other jurisdictions have characterized precharge delay that may affect sentencing as "speculative," but nonetheless considered the second part of the *Marion* analysis, the state's motive. We likewise turn to the issue of whether the state's delay resulted from an improper motive.

To support his due-process challenge, appellant relies solely on the fact that the state's charging delay increased his sentence. This is not sufficient to meet appellant's burden because we do not infer improper motive from the fact of delay alone. *Lussier*, 695 N.W.2d at 656 ("[W]e cannot infer an improper state motive from such delay alone, even when it results in a more severe criminal history score and a longer sentence."); *see also United States v. Brockman*, 183 F.3d 891, 896 (8th Cir. 1999) (noting that increased criminal-history score results from the defendant's actions and cannot be attributed to the state). Appellant has made no showing as to the state's motive, improper or otherwise.

On this record, we conclude that the district court did not err in denying appellant's motion to dismiss due to precharge delay.

**2. The district court did not err by denying appellant's motion to suppress methamphetamine found in a warrantless search of appellant's dresser.**

Appellant argues that the district court erred by denying suppression of the methamphetamine that was located in the dresser.[3] Respondent contends that the search of the dresser and eyeglass case was performed incident to appellant's arrest and that exigent circumstances justified the search. "When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999).

The United States and Minnesota constitutions prohibit a warrantless search of a home. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Warrantless searches and seizures are per se unreasonable unless permitted by one of a limited number of exceptions. *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967); *State v. Othoudt*, 482 N.W.2d 218, 222 (Minn. 1992). The state has the burden of showing that at least one of the exceptions applies in order to avoid suppression of the evidence acquired from the warrantless search. *State v. Metz*, 422 N.W.2d 754, 756 (Minn. App. 1988).

[3] Appellant does not contest the seizure of methamphetamine and drug paraphernalia found on top of the dresser, as these items were in plain view of the officers at the time of appellant's arrest. *See State v. Campbell*, 581 N.W.2d 870, 871 (Minn. App. 1998) (noting that police may seize evidence in plain view without a warrant under certain circumstances).

One of the recognized exceptions to the warrant requirement is exigent circumstances. Exigent circumstances may be established by a single factor or by the "totality of the circumstances." *State v. Gray*, 456 N.W.2d 251, 256 (Minn. 1990).[4] The following single factors, standing alone, support a finding of exigent circumstances: (1) hot pursuit of a fleeing felon, (2) imminent destruction or removal of evidence, (3) protection of human life, (4) likely escape of the suspect, and (5) fire. *Id.*

Respondent argues that the search of the dresser and eyeglass case was justified because the officers legitimately feared for their safety and were concerned about destruction of evidence. We agree. Prior to the search, the officers saw and heard appellant opening and closing the dresser drawers. When the officers entered the bedroom, appellant was standing near the dresser. At that point, the officers did not know what was in the dresser or how many people were in the house. The officers had opened an emergency channel because they were concerned that the noises they heard in the bedroom could have been appellant searching for a weapon. And as Officer Bierdeman began opening the dresser drawers, appellant yelled "hide the stuff, hide the stuff." Given the totality of the circumstances, the officers had a reasonable belief that searching the dresser was necessary to secure the scene, ensure their personal safety, and prevent the destruction of evidence.

[4] Appellant does not dispute that the officers had probable cause to search because of the drugs and paraphernalia in plain view on top of the dresser.

Appellant argues that the officers could have secured the premises, including its occupants, and then waited for a search warrant, following *State v. Alayon*, 459 N.W.2d 325, 329-30 (Minn. 1990). But only two officers were on the scene. One was needed to secure appellant and to ensure that he could not access whatever was inside the dresser. The other would have had to both arrest appellant's girlfriend and perform a protective sweep around the interior of the house to ensure there were no threats to officer safety or risk of evidence being destroyed. Under the circumstances, this course of action would have put an undue strain on the arresting officers and risked their safety and the destruction of evidence. *See State v. Bergerson*, 671 N.W.2d 197, 202 (Minn. App. 2003) (recognizing the police's interest in protective sweeps for officer safety), *review denied* (Minn. Jan. 20, 2004).

In his pro se supplemental brief, appellant contends that the officers did not actually fear for their safety at the time they conducted the search. This argument is unavailing. The officers saw and heard someone in the upstairs room opening and closing dresser drawers. They had no way of knowing what was going on in that bedroom, whether there was a weapon in the dresser, or whether appellant was destroying evidence. The officers came into the room with an emergency radio channel open and their weapons drawn. The district court, in dismissing the motion to suppress the seizure of the methamphetamine, found the testimony of the officers to be credible. Based on the record, there is sufficient evidence to conclude that the officers had reason to fear for their safety.

Our review of the record supports the district court's determination that the warrantless search of the dresser was justified by exigent circumstances. Because we conclude that the exigent-circumstances exception to the warrant requirement applies here, we do not address the issue of whether the search was a valid search incident to arrest.

**Affirmed.**