

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1658**

State of Minnesota,
Respondent,

vs.

Kenneth Freeland Jami Morrow, Jr.,
Appellant.

**Filed January 11, 2021
Affirmed
Segal, Chief Judge**

Blue Earth County District Court
File No. 07-CR-18-455

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Patrick R. McDermott, Blue Earth County Attorney, Susan B. Devos, Assistant County Attorney, Mankato, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Chang Y. Lau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Segal, Chief Judge; and Kirk,
Judge.*

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

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

Appellant challenges his convictions of being an ineligible person in possession of ammunition and receiving stolen property, arguing that his right to a speedy trial was violated. Appellant also argues that the district court abused its discretion by denying his motion for a downward durational departure. We affirm.

FACTS

On January 29, 2018, two law enforcement officers were surveilling a residence in Mankato. The officers were conducting surveillance on A.Y., who had outstanding warrants. The officers had reason to believe A.Y. was inside the house, along with appellant Kenneth Freeland Jami Morrow, Jr. While observing the alley in back of the house, the officers saw A.Y., Morrow, and two unidentified men leave and get into a car. Morrow sat in the rear, passenger-side seat of the car. The officers followed the car to the front of the house, where one of the unidentified men got out, and the car was then driven away from the residence.

A third officer, in a marked squad, stopped the car.¹ While speaking with the occupants, the officers detected a strong odor of marijuana coming from the car and decided to search the car because they believed there may be narcotics inside. During the search, the officers discovered methamphetamine, silver bars and coins, and a loaded

¹ The two officers surveilling the residence were in plain clothes and in an unmarked vehicle, so they requested a uniformed officer in a marked squad car to initiate the traffic stop.

firearm. The silver was discovered in a backpack that also contained a wallet with Morrow's identification, and the loaded firearm was discovered under the rear passenger-side seat where Morrow had been sitting. The officers later obtained a warrant to search the house. The officers executed the search warrant the same day as the traffic stop and discovered additional methamphetamine, drug paraphernalia, collector's coins, and a box of ammunition.

One of the officers conducted a recorded interview with Morrow the following day. During the interview, Morrow admitted that he knew the silver was stolen, but stated that it had "nothing at all to do with" him. He also admitted to touching the ammunition discovered at the house, but denied owning or possessing the loaded firearm found in the car.

Respondent State of Minnesota charged Morrow with two counts of being an ineligible person in possession of a firearm or ammunition under Minn. Stat. § 609.165, subd. 1b(a) (2016), one count of being an ineligible person in possession of a firearm or ammunition under Minn. Stat. § 624.713, subd. 1(2) (2016), and receiving stolen property under Minn. Stat. § 609.53, subd. 1 (2016). The complaint alleged that Morrow was ineligible to possess a firearm or ammunition based on a prior conviction for a crime of violence and that he had possessed the loaded firearm discovered in the car, the ammunition discovered during the search of the residence, and the stolen silver.

On May 7, 2018, Morrow failed to appear for an omnibus hearing and a bench warrant was issued. On June 6, a second warrant was issued following a report that Morrow had violated the conditions of his pretrial release. On November 29, Morrow filed a

demand for a speedy trial. On December 14, Morrow's counsel filed a letter with the district court indicating that Morrow had been in custody in Douglas County since May 31, 2018. He faced charges in Douglas County of check forgery, controlled-substance crimes, unlawful possession of a firearm, criminal vehicular operation, and fleeing a police officer. The letter also reiterated the speedy-trial demand and requested that the district court respond with possible trial dates. On December 18, court staff contacted Morrow's counsel about starting trial on February 5, 2019. Morrow's counsel responded that she would be available for trial but asked the court for a finding of good cause to start the trial outside of the 60-day speedy-trial deadline imposed by Minn. R. Crim. P. 11.09. Morrow's counsel did not receive a response.

On January 10, 2019, Morrow's counsel filed another letter with the district court, indicating that she had not received a response following her conversation with court staff on December 18 and again reiterating Morrow's speedy-trial demand. On January 22, the district court issued an order setting the pretrial hearing for February 5, the jury trial for February 6, and finding good cause for the delay because "there [was] no other availability on the court calendar" and Morrow was already committed to the commissioner of corrections. The state moved to continue the trial based on the unavailability of witnesses from the Minnesota Bureau of Criminal Apprehension (BCA). The district court granted the motion and set the trial for April 24, 2019, the next available date on the court's calendar. Morrow filed a motion to dismiss the charges based on a violation of his right to a speedy trial, which the district court denied.

The jury trial commenced on April 24, 2019. Following a two-day trial, the jury found Morrow guilty of one count of being an ineligible person in possession of ammunition based on his possession of the box of ammunition found at the residence and receiving stolen property based on his possession of the silver, but acquitted him of the charges that alleged he possessed the loaded firearm found in the car. Morrow moved for a downward dispositional or durational departure. The district court denied the motion and sentenced Morrow to a presumptive sentence of 60 months in prison, the mandatory minimum for being an ineligible person in possession of ammunition. This appeal follows.

DECISION

I. Morrow’s right to a speedy trial was not violated.

The United States and Minnesota Constitutions afford criminal defendants the right to a speedy trial. U.S. Const. amend. VI; Minn. Const. art. I, § 6. Pursuant to Minn. R. Crim. P. 11.09, a trial must start within 60 days of a speedy-trial demand unless the court finds good cause for a later trial date. A defendant must be released if the trial does not start within 120 days of the speedy-trial demand “[u]nless exigent circumstances exist.” Minn. R. Crim. P. 11.09. If a defendant has been deprived of his constitutional right to a speedy trial, the criminal case against him must be dismissed. *State v. Osorio*, 891 N.W.2d 620, 627 (Minn. 2017). We review a claimed speedy-trial violation de novo. *State v. Taylor*, 869 N.W.2d 1, 19 (Minn. 2015).

“[T]o determine whether a speedy-trial violation has occurred, we apply the four-factor balancing test set forth by the Supreme Court of the United States in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182 [(1972)].” *Osorio*, 891 N.W.2d at 627. The

four factors, often referred to as the *Barker* factors, are: “(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.* (quotation omitted). “None of these factors is either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant.” *Taylor*, 869 N.W.2d at 19 (quotation omitted). It is “a difficult and sensitive balancing process” in which the court considers “the conduct of both the State and the defendant.” *Osorio*, 891 N.W.2d at 628 (quotations omitted). We address each factor in turn.

Length of Delay

The first factor is the length of the delay. “The length of the delay is a triggering mechanism which determines whether further review is necessary.” *Id.* (quotations omitted). Analysis of the other three factors is required if the length of the delay is presumptively prejudicial. *State v. Johnson*, 498 N.W.2d 10, 15-16 (Minn. 1993). Under Minnesota law, a delay of 60 days following a speedy-trial demand is presumptively prejudicial. *State v. Windish*, 590 N.W.2d 311, 315-16 (Minn. 1999). Here, the delay between Morrow’s November 29 speedy-trial demand and the start of the trial on April 24 was 146 days. Accordingly, the length of the delay is presumptively prejudicial and we must analyze the remaining three factors.

Reason for Delay

The second factor requires the court to consider the reason for the delay. When considering the reason for the delay, “the key question is whether the government or the

criminal defendant is more to blame for the delay.” *Osorio*, 891 N.W.2d at 628 (quotation omitted). Once the court has determined which party is responsible for the delay, the court considers the specific reasons for the delay, with various reasons being weighed differently. *Id.* If the delay is the result of negligence or an overcrowded court docket, the delay is weighted less heavily than an intentional effort on the part of the state to delay trial for improper motives. *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192.

Here, the reason for the delay was largely due to the court’s schedule and the state’s request for a continuance based on witness unavailability. Morrow made his speedy-trial demand on November 29, 2018, and his counsel explicitly requested that the district court contact her with potential trial dates on December 14, 2018. The record indicates that Morrow’s counsel spoke with court staff about a trial date on December 18, but the district court did not issue an order setting a trial date until January 22, for trial to start on February 5, 2019. The state then made a request for a continuance due to witness unavailability, which the district court granted. The district court ultimately scheduled the trial to begin on April 24, noting that an earlier date was “impossible” because of the judge’s schedule.

It bears noting, as the district court points out in its order denying Morrow’s motion to dismiss, that six weeks of the delay were caused by Morrow because of his failure to appear for the omnibus hearing. When Morrow made his speedy-trial demand on November 29, he was not being held in custody on the charges in this case. He also had two active warrants: one for failure to appear at the omnibus hearing and the other for allegedly violating the terms of his conditional release. It was not until December 14 that Morrow’s counsel advised the court that Morrow had been in custody in another county on

new, unrelated criminal charges since May 2018. Morrow's counsel did not request that the warrants be quashed until January 10, 2019. The district court, thus, calculated that the time period between the date Morrow's counsel requested that the warrants be quashed until the April trial date was 104 days, and that the first 42 days between the demand for the speedy trial and the request to quash should be held against Morrow and not the state.

Nevertheless, the primary reason for the delay was the court's calendar congestion and the unavailability of the state's witnesses.² While these reasons are given less weight than deliberate attempts to delay the trial, they still weigh against the government. *State v. Reese*, 446 N.W.2d 173, 179 (Minn. App. 1989), *review denied* (Minn. Nov. 15, 1989).

Assertion of Speedy-Trial Right

The third factor is whether Morrow asserted his speedy-trial right. "The defendant's assertion of his speedy trial right is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *Osorio*, 891 N.W.2d at 629 (quotation omitted). "[T]he frequency and force of a demand must be considered when weighing this factor and the strength of the demand is likely to reflect the seriousness and extent of the prejudice which has resulted." *State v. Friberg*, 435 N.W.2d 509, 515 (Minn. 1989). Here, Morrow first made a speedy-trial demand on November 29, 2018. He reasserted the right through counsel on December 14, 2018, and January 10, 2019, raised

² Morrow points out that the state ultimately did not call the BCA witnesses, who were unavailable for the initial trial date, to testify at the trial. There could be a variety of reasons why the state thought testimony from BCA representatives was necessary prior to trial, but determined it was not needed once trial commenced. Thus, without more, we cannot conclude that the motion for the continuance was brought in bad faith.

the issue of the speedy-trial demand at the pretrial hearing, and moved to dismiss the charges based on a violation of his speedy-trial rights. This factor therefore clearly weighs in Morrow's favor.

Prejudice to Defendant

The final factor considers whether Morrow was prejudiced by the delay in bringing the matter to trial. "Three types of prejudice may result from an unreasonable delay between formal accusation and trial: oppressive pretrial incarceration, anxiety and concern of the accused, and the possibility that the accused's defense will be impaired." *Osorio*, 891 N.W.2d at 631 (quotations omitted). The most serious form of prejudice is the possibility that the defense will be impaired "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.* (quotations omitted).

Morrow acknowledges that he was incarcerated in Douglas County for unrelated charges during the delay period, but argues that he nonetheless experienced more restrictive incarceration conditions and suffered stress and anxiety from the delay. But "[i]f a defendant is already in custody for another offense . . . the first two interests are not implicated." *Taylor*, 869 N.W.2d at 20. Thus, Morrow's arguments addressing the first two types of prejudice have no impact on the analysis.

The remaining question is "whether the defense was likely harmed by the delay." *Id.* Morrow makes no argument on this last factor and does not identify any harm caused by the delay in mounting his defense. And our review of the record reveals no such harm. Indeed, Morrow was acquitted of the two charges based on the allegation that he possessed

the loaded firearm found in the car. He was convicted of possessing the ammunition found in the house and the stolen silver, but he admitted during the recorded interview that he had touched the ammunition and knew the silver was stolen, and his identification was found in the backpack containing the stolen silver. The evidence against Morrow on these charges was strong and Morrow has failed to articulate how the delay may have harmed any potential defense to these charges. Accordingly, the prejudice factor weighs against finding a speedy-trial violation.

Having addressed each factor, we must now balance them to determine whether Morrow's right to a speedy trial was violated. In balancing the factors, Minnesota courts have emphasized the importance of the prejudice factor. *See State v. Jones*, 392 N.W.2d 224, 234-36 (Minn. 1986); *State v. Strobel*, 921 N.W.2d 563, 573 (Minn. App. 2018), *aff'd*, 932 N.W.2d 303 (Minn. 2019).³ In both *Jones* and *Strobel*, the appellate courts concluded that the first three factors weighed at least slightly in favor of the defendant, but nonetheless determined that the defendant's right to a speedy trial had not been violated because the defendant did not suffer any prejudice as a result of the delay. *Jones*, 392 N.W.2d at 234-36; *Strobel*, 921 N.W.2d at 573.

We reach the same conclusion here despite Morrow's clear assertion of his right to a speedy trial. Morrow was incarcerated on new, unrelated charges during the delay and suffered no apparent prejudice in being able to present his defense. And because the

³ The Minnesota Supreme Court granted Strobel's petition for review on an issue related to his criminal-history score, but denied his petition for review of his speedy-trial claim. 932 N.W.2d at 306 n.4.

reasons for the delay were largely administrative, rather than the result of a deliberate attempt by the state to delay the trial, that factor weighs less heavily against the state. *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192. On the facts presented here, we conclude that Morrow’s right to a speedy trial was not violated.

II. The district court did not abuse its discretion by denying Morrow’s motion for a downward durational departure.

Morrow argues that the district court abused its discretion by denying his motion for a downward durational departure and sentencing him to the mandatory minimum of 60 months in prison. Morrow was convicted of being an ineligible person in possession of ammunition under Minn. Stat. § 624.713, subd. 1(2). Pursuant to Minn. Stat. § 609.11, subd. 5(b) (2016), an individual convicted of violating this statute “shall be committed to the commissioner of corrections for not less than five years.” But a district court may “sentence the defendant without regard to the mandatory minimum . . . if the court finds substantial and compelling reasons to do so.” Minn. Stat. § 609.11, subd. 8(a) (2016).

A guidelines sentence is presumed to be appropriate and the district court must impose it unless “identifiable, substantial, and compelling circumstances” justify a downward departure. *State v. Johnson*, 831 N.W.2d 917, 925 (Minn. App. 2013) (quotation omitted), *review denied* (Minn. Sept. 17, 2013); *see also* Minn. Sent. Guidelines 2.D.1 (2016). The sentencing court has “broad discretion” and an appellate court will only reverse a sentencing court’s refusal to depart in a “rare” case. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). This court generally will not disturb the imposition of a presumptive sentence when “the record shows that the sentencing court carefully evaluated all the

testimony and information presented” before imposing a sentencing. *Johnson*, 831 N.W.2d at 925 (quotation omitted). And we will ordinarily not disturb the district court’s imposition of the presumptive guidelines sentence, even when reasons for a downward departure exist. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006).

A district court may grant a downward durational departure “if the defendant’s conduct is significantly less serious than that typically involved in the commission of the offense.” *State v. Mattson*, 376 N.W.2d 413, 415 (Minn. 1985). Unlike a dispositional departure, the appropriateness of a durational departure depends solely on the nature of the offense, rather than a defendant’s amenability to treatment or probation. *State v. Behl*, 573 N.W.2d 711, 713 (Minn. App. 1998), *review denied* (Minn. Mar. 19, 1998). We review the district court’s refusal to depart from the presumptive sentence for an abuse of discretion. *Id.* at 714.

With regard to Morrow’s conviction for possession of the ammunition, Morrow argues that his conduct was significantly less serious than the typical offense because he did not own the ammunition and only possessed it for a brief period of time. According to evidence in the record, the ammunition was thrown to him in a bag so that he could look at it and Morrow theoretically did not know that the bag contained ammunition until he opened it. The evidence does not show that Morrow possessed the ammunition for any substantial length of time.

Morrow acknowledges that Minnesota does not recognize a “fleeting possession” defense to violations of Minn. Stat. § 624.713, subd. 1(2), *see In re Welfare of S.J.J.*, 755 N.W.2d 316, 318-19 (Minn. App. 2008), but argues that the circumstances of the offense

nonetheless minimize his culpability even if they do not absolve him. While we are sympathetic to this argument, it is not sufficient to demonstrate an abuse of discretion by the district court in not granting a downward durational departure. The state had requested a “top-of-the-box” sentence of 68 months. Here, the district court imposed the mandatory minimum sentence for this offense of 60 months and, thus, may have factored in the severity of the offense in determining the sentence.

Morrow counters that deference is not due the district court’s sentencing decision, because the court did not make findings on whether the offense was less serious than the typical possession case. A district court, however, is not required to make such findings when imposing a presumptive sentence. *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985) (“Although the trial court is required to give reasons for departure, an explanation is not required when the court considers reasons for departure but elects to impose the presumptive sentence.”).

Moreover, we note that the district court took Morrow’s requests for downward departures under advisement at the sentencing hearing and asked the parties for written memoranda addressing Morrow’s requests. The court then set a second sentencing hearing at a later date after the court had the opportunity to review the memoranda. At the start of the second sentencing hearing, the district court stated that it had reviewed and considered the memoranda and arguments presented by both Morrow and the state. The record thus shows that the district court considered and evaluated the arguments and information presented before imposing a “bottom-of-the-box” presumptive sentence.

The final argument raised by Morrow is that the district court erred because it considered offender-related characteristics—his criminal history and new charges—in denying the downward durational departure. Offender-related characteristics are only relevant in assessing the basis for a downward dispositional departure, not a durational departure. *State v. Peter*, 825 N.W.2d 126, 130 (Minn. App. 2012), *review denied* (Minn. Feb. 27, 2013). Based on our review of the transcript from the sentencing hearing, the district court does not appear to have relied on the wrong factors. While the district court discussed Morrow’s criminal history and new charges, this was only in connection with the request for a dispositional departure. The court’s comments were made in response to Morrow’s claim that he was amenable to probation to “turn his life around.” Accordingly, it appears that the district court properly considered Morrow’s criminal history and the new charges when addressing Morrow’s motion for a downward durational departure, and did not state that it was denying the motion for a downward durational departure based on these factors.

In short, the evidence presented does not justify treating this as that “rare case” where reversal is appropriate. *State v. Soto*, 855 N.W.2d 303, 305 (Minn. 2014); *Kindem*, 313 N.W.2d at 7. We therefore conclude that the district court did not abuse its discretion by denying Morrow’s motion for a downward durational departure.

Affirmed.