

FILED

June 20, 2023

**OFFICE OF
APPELLATE COURTS**

STATE OF MINNESOTA

IN SUPREME COURT

A22-1294

State of Minnesota,

Respondent,

vs.

Robert John Virnig,

Petitioner.

O R D E R

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition of Robert John Virnig for further review is denied.

Dated: June 20, 2023

BY THE COURT:



Lorie S. Gildea
Chief Justice

*This opinion is nonprecedential except as provided by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
A22-1294**

State of Minnesota,
Respondent,

vs.

Robert John Virnig,
Appellant.

**Filed February 27, 2023
Affirmed
Larkin, Judge**

Morrison County District Court
File No. 49-CR-20-540

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

Brian Middendorf, Morrison County Attorney, Michel P. Chisum, Elizabeth M.H. Ziebarth, Assistant County Attorneys, Little Falls, Minnesota (for respondent)

Mark D. Kelly, Law Offices of Mark D. Kelly, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Larkin, Judge; and Frisch, Judge.

NONPRECEDENTIAL OPINION

LARKIN, Judge

Appellant challenges his conviction for first-degree possession of a controlled substance, arguing that the district court erred by denying his motion to suppress the drug

evidence. Appellant also challenges his sentence, arguing that the district court abused its discretion by denying his motion for a downward dispositional departure. We affirm.

FACTS

In April 2020, respondent State of Minnesota charged appellant Robert John Virnig with first-degree possession of a controlled substance after executing a search warrant at his residence and recovering a large amount of methamphetamine. In obtaining the search warrant, law enforcement relied on information provided by a “concerned citizen” who was ultimately identified as Virnig’s estranged wife, MV. The information that MV provided included a picture of Virnig “asleep behind a desk in his residence” near “plastic baggies” containing a substance that “appeared to be methamphetamine.”

Virnig moved to suppress evidence recovered during the search. He argued that MV acted as a government agent and relayed information to law enforcement in violation of his constitutional rights. He focused his arguments on the picture that MV provided to law enforcement. He claimed that the search warrant relied on that photograph, that the photograph was improperly obtained, and that without it, the search warrant did not establish probable cause for the search.

In September 2021, the district court held a hearing on Virnig’s motion to suppress. Virnig introduced into evidence text messages between MV and law enforcement and a transcript of an interview that law enforcement conducted with MV in February 2020.

MV testified regarding her involvement with law enforcement, including meetings with them in July 2019 and February 2020. During those meetings, law enforcement asked MV to conduct a “controlled buy” and offered her money and protection, but MV declined.

MV testified that at the February 2020 meeting, officers asked her for “pictures of pipes or drugs or paraphernalia or anything like that,” and that she told them that she did not have access to “that stuff” because it was locked in Virnig’s shop. Law enforcement also requested that MV provide information regarding individuals who came and went from Virnig’s property. MV began providing pictures and information regarding individuals who visited Virnig’s residence.

On April 24, 2020, MV sent law enforcement a picture of Virnig asleep at his desk “with drugs around him.” She took the photo at around 4:00 a.m., “[i]n the shop in his office.” She was able to gain entry because the door was unlocked. She snuck into the shop because Virnig had previously told her to leave the house.¹ MV immediately sent the picture to law enforcement “[b]ecause that’s what they told [her] that they wanted.” When asked on cross-examination if law enforcement ever instructed her to “do a specific act on a specific time,” MV responded: “They said . . . anytime [you] can get into the back . . . take pictures of this stuff because that’s what [we] . . . need[] . . .” MV conceded that law enforcement did not instruct her to go to Virnig’s house on a specific day.

Investigator Casey King testified that he and another officer met with MV in July 2019. At that meeting MV was not given specific tasks to perform or promised any payment. King testified that MV texted him pictures of individuals she believed were involved in narcotics activity, but that he did not request those photos. King asked MV to be a confidential informant, and she declined.

¹ MV and Virnig resided at separate locations.

King testified that at the meeting in February 2020, an officer requested a description of the interior of Virnig's house and law enforcement once again asked MV to act as a confidential informant. MV once again declined. King testified that he asked MV to contact him if Virnig was "ever going to pick up drugs," and one of the officers told MV to take pictures of any drugs or paraphernalia in Virnig's possession and to send the pictures to King. King testified that he did not control MV's actions, give her a timeline, supply her with equipment, provide her with specific instructions, or ask that she contact him before taking any actions. King testified that every few days, MV would send him a text or photograph.

King testified that on April 24, 2020, at around 4:00 or 4:30 a.m., MV texted him a picture of Virnig sitting in a chair in his office with methamphetamine in front of him. MV's text said: "Woke up and [Virnig] wasn't in bed. I found him in the back office sleeping in a chair and something else you might want to see." King testified that he was not aware of MV's actions prior to the text message and that he did not direct her actions or ask her to take the photo.

The district court denied Virnig's motion to suppress. The charge was tried to the district court, and the court found Virnig guilty as charged.

Virnig underwent a presentence investigation (PSI), and the PSI recommended a 105-month prison sentence under the sentencing guidelines, which called for a presumptive sentencing range of 90 to 126 months. Virnig moved for a dispositional sentencing departure, arguing that he was particularly amenable to probation. The district court denied Virnig's motion and sentenced him to serve 105 months in prison. Virnig appeals.

DECISION

I.

Virnig contends that the district court erred in denying his motion to suppress. When reviewing a district court's pretrial order on a motion to suppress evidence, we review the district court's factual findings for clear error and its legal determinations de novo. *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008).

The United States and Minnesota Constitutions prohibit unreasonable searches and seizures by the government. U.S. Const. amend. IV; Minn. Const. art. I, § 10. These constitutional protections act "as a restraint upon the *activities of the government*."² *State v. Buswell*, 460 N.W.2d 614, 617 (Minn. 1990) (emphasis added). Thus, an unreasonable search by a nongovernmental actor, a private search, will not result in evidence being suppressed because there is no constitutional violation. *Id.* at 617-18.

"However, the mere fact that a private individual made the search and seized the contraband does not always isolate his or her conduct from Fourth Amendment scrutiny." *Id.* at 618. "If, in the light of all the circumstances of the case the private individual must be regarded as having acted as an instrument or agent of the state when conducting the search, the search is subject to Fourth Amendment constraints." *Id.* (quotations omitted). "The determination of whether the private person acted as an agent of the state is one of fact to be decided on a case-by-case basis after consideration of all the facts and circumstances relative to the search." *Id.*

² Virnig does not assert that the Minnesota Constitution provides additional protections in this case, and we therefore apply Fourth Amendment caselaw.

“Whether a private party should be deemed an agent or instrument of the government for Fourth Amendment purposes necessarily turns on the degree of the government’s participation in the private party’s activities.” *Id.* (quotation omitted). Relevant factors include “(1) whether the government knew of and acquiesced in the search and (2) whether the search was conducted to assist law enforcement efforts or to further the private party’s own ends.” *Id.*; *see also State v. Jorgensen*, 660 N.W.2d 127, 131 (Minn. 2003) (applying two-factor test). Ultimately, however, “the diversity in factual settings involving private searches mandates an individual case-by-case analysis in which precedent plays but a small part” and the “final determination of whether the government’s involvement was such as to transform a private search into a governmental search subject to the constraints of the Fourth Amendment is a question of fact to be resolved by the [district] court.” *Buswell*, 460 N.W.2d at 618. We will not disturb the district court’s findings on the issue unless they are clearly erroneous. *Id.* “A factual determination is clearly erroneous if it is unsupported by the record.” *State v. Heath*, 685 N.W.2d 48, 61 (Minn. App. 2004), *rev. denied* (Minn. Nov. 16, 2004).

In denying Virnig’s motion to suppress, the district court found that MV had not acted as a government agent, reasoning that law enforcement did not know of, participate in, or acquiesce to MV’s search of Virnig’s residence. The court found that MV “took the picture on her own volition” and sent it to law enforcement, “who had no idea she was at the house, or what she was doing.” Virnig challenges that finding, arguing that the government knew of and acquiesced in the April 24 picture that MV took of Virnig and sent to law enforcement. He notes that law enforcement maintained regular contact with

MV and asked her to take pictures of drugs or paraphernalia and to send those pictures to law enforcement. He therefore asserts that officers took steps to persuade MV to conduct searches in a particular manner and encouraged her to search for particular items.

The district court acknowledged that law enforcement had been seeking MV's assistance since July 2019. The district court further acknowledged that at the meeting on February 5, 2020, law enforcement made "specific requests for information." But the district court found that law enforcement's request for MV to provide pictures of drugs was made 79 days prior to the April 24 picture in question and was "plainly antecedent" because law enforcement did not instruct MV to conduct the search on April 24 and did not participate in planning that search. Essentially, the district court found that law enforcement did not influence on the *particular* search in question.

The record shows that on February 5, 2020, law enforcement requested that MV take pictures of any drugs or paraphernalia in Virnig's possession. However, given that the police did not ask or instruct MV to take the photo on April 24, the district court did not clearly err in finding that MV was not acting as a government agent at that time. The district court applied the relevant law and based its decision on the specific circumstances surrounding the search at issue.

Moreover, caselaw supports the district court's finding. In *Buswell*, the Minnesota Supreme Court found that a prior meeting between law enforcement and the private citizen who conducted the search at issue amounted only to antecedent contact because, even though law enforcement and the private citizen discussed arrest procedures, the meeting did not indicate that law enforcement knew of or encouraged the specific searches in

question. 460 N.W.2d at 619 (“[T]he record [is] devoid of evidence that law enforcement officials were aware of or encouraged *the specific searches in question.*”) (emphasis added)).

In sum, given the record evidence that law enforcement was not involved in the specific search at issue here, the district court did not clearly err in finding that MV was not acting as a government agent when she photographed Virnig sleeping next to methamphetamine and sent the picture to law enforcement. “If the government does not know of and acquiesce in the search, the search cannot be attributed to the government and the inquiry ends.” *Jorgensen*, 660 N.W.2d at 131. We therefore affirm the district court’s denial of Virnig’s motion to suppress.

II.

Virnig contends that the district court abused its discretion by denying his motion for a downward dispositional departure because he established that he is particularly amenable to probation.

The Minnesota Sentencing Guidelines establish presumptive sentences for criminal offenses and seek to “maintain uniformity, proportionality, rationality, and predictability in sentencing.” Minn. Stat. § 244.09, subd. 5 (2022). “Consequently, departures from the guidelines are discouraged and are intended to apply to a small number of cases.” *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). A district court may depart from the presumptive sentence only when there are “identifiable, substantial, and compelling circumstances to support a departure.” Minn. Sent’g Guidelines 2.D.1 (2019).

When substantial and compelling circumstances exist, the district court has broad discretion to depart, and we generally will not interfere with the exercise of that discretion. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). This court will reverse the district court's refusal to depart from the presumptive sentence only in a "rare" case. *Id.* We will not reverse the district court's refusal to depart "as long as the record shows the [district] court carefully evaluated all the testimony and information presented before making a determination." *State v. Pegel*, 795 N.W.2d 251, 255 (Minn. App. 2011) (quotation omitted).

When considering a dispositional departure, the district court focuses "more on the defendant as an individual and on whether the presumptive sentence would be best for him and for society." *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). A defendant's particular amenability to probation can justify downward dispositional departure from a presumptive sentence. *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014). The requirement of particular amenability ensures that "the defendant's amenability to probation distinguishes the defendant from most others and truly presents the substantial and compelling circumstances that are necessary to justify a departure." *Id.* at 309 (quotation omitted).

Relevant factors for determining whether the defendant is particularly amenable to probation include the defendant's age, prior criminal record, remorse, cooperation, attitude in court, and support of friends and family. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). Even if there is evidence that the defendant would be particularly amenable to probation, a

district court is not required to impose a downward dispositional departure. *State v. Olson*, 765 N.W.2d 662, 664-65 (Minn. App. 2009).

Virnig notes that at the time of sentencing he “was enrolled in a long-term treatment program,” he “had completed six of fourteen months of that program,” and “all signs pointed towards his successful completion of that program.” Virnig also notes that he participated in choir, attended church twice weekly, took educational classes, completed community service, and has strong family support. Virnig acknowledges that he has three prior felony convictions, but he argues that only one of those was a drug offense, which occurred in 2004.

The district court considered the arguments of the parties and all of the information presented and ultimately concluded that Virnig was not particularly amenable to probation. The district court noted that Virnig’s tenure in treatment had “been relatively brief as compared to an extremely extensive decade’s long addiction and involvement with illicit narcotics.” The district court discussed Virnig’s prior convictions, including a “prior first-degree sale conviction,” and questioned whether Virnig’s success in treatment would continue “given his history.” The district court reasonably concluded that a departure was not warranted. This is not a “rare” case in which the district court abused its discretion by imposing a presumptive sentence. We therefore affirm Virnig’s sentence.

Affirmed.

JUL 13 2022

STATE OF MINNESOTA
COUNTY OF MORRISON

IN DISTRICT COURT
SEVENTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

Vs.

Robert John Virnig,

Defendant.

Court File Number: 49-CR-20-540

AMENDED ORDER,
AFTER COURT TRIAL

The above entitled proceeding came on for a Court Trial on stipulated evidence on June 30, 2022, before the Honorable Antoinette Wetzel, County of Morrison, and State of Minnesota. The Defendant had been charged with 1st Degree Controlled Substance Crim under Minn. Statute 152.21.2(a)(1) filed by the State on April 24, 2020. The State was represented by the County Attorney's office, Michel Chisum. The Defendant, Robert John Virnig, appeared in person and was represented by his attorney, Mark Kelly. The Court proceeded with the court trial under Minn. Rules of Criminal Procedure, Rule 26.01 Subd. 4.

After hearing all of the testimony and viewing the exhibits, the Court finds as follows:

ORDER

- 1) The Court finds the Defendant, Robert John Virnig, **GUILTY** as charged under Minn. Statute 152.21.2(a)(1).

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: July 13, 2022



Antoinette C. Wetzel
Judge of District Court

MEMORANDUM

On April 24, 2020, SWAT and the Central MN Violent Offender Task Force entered the property of the Defendant on Skyview Road in Morrison County via a warrant signed by a judge. Upon entry of the property, law enforcement located a large amount of a controlled substance, cash and ammunition. After law enforcement located the Defendant, Robert John Virnig, he admitted to having methamphetamine in his shop and that he had been conducting drug sales at his residence. Defendant has argued that a confidential informant (CCI) was acting as a government agent and that all the information obtained from the CCI should be suppressed as an illegal search of his residence. The Court reviewed the information provided from the CCI and after a hearing on September 9, 2021 and briefs submitted by both parties, the Court denied the Defendant's motion to suppress on December 14, 2021. The Court trial was then held on June 30, 2022 as to which all the evidence was submitted to the Court by the State as per a stipulation between the parties as per Rule 26.01 of Minnesota Criminal Procedure.

Criminal Procedure, Rule 26.01 Trial by Jury or by the Court, Subd. 4. Stipulation to Prosecution's Case to Obtain Review of a Pretrial Ruling.

- (a) When the parties agree that the court's ruling on a specified pretrial issue is dispositive of the case, or that the ruling makes a contested trial unnecessary, the following procedure must be used to preserve the issue for appellate review.
 - (b) The defendant must maintain the plea of not guilty.
 - i) In the above cited case, the Defendant, Robert John Virnig, has plead not guilty.
 - (c) The defendant and the prosecutor must acknowledge that the pretrial issue is dispositive, or that a trial will be unnecessary if the defendant prevails on appeal.
 - i) Both parties have acknowledged on the record that the pretrial issue is dispositive, or that a trial will be unnecessary if the defendant prevails on appeal.

Defendants' attorney advised that the pre-trial ruling regarding search warrant would be the issue raised on appeal.

(d) The defendant, after an opportunity to consult with counsel, must waive the right to a jury trial under subdivision 1(2)(a), and must personally waive the rights specified in subdivision 3(b)(1)-(4).

i) The Defendant stated on the record that he has appropriately waived the right to a jury trial and the rights specified in subdivision 3(b)(1)-(4) as required.

(e) The defendant must stipulate to the prosecution's evidence in a trial to the court and acknowledge that the court will consider the prosecution's evidence, and that the court may enter a finding of guilt based on that evidence.

i) The Defendant through his attorney stated on the record his stipulation of the State's evidence or witnesses and acknowledged the Court will consider the State's evidence and could enter a finding of guilt based on that evidence.

(f) The defendant must also acknowledge that appellate review will be of the pretrial issue, but not of the defendant's guilt, or of other issues that could arise at a contested trial.

i) The Defendant acknowledged that the appellate review is only of the pretrial issue, and not that of the defendant's guilt.

(g) The defendant and the prosecutor must make the preceding acknowledgments personally, in writing or on the record.

i) Both the State and the Defendant, or through council has made all of the preceding acknowledgements on the record at the hearing held on June 30, 2022.

(h) After consideration of the stipulated evidence, the court must make an appropriate finding, and if that finding is guilty, the court must also make findings of fact on the record or in writing as to each element of the offense(s).

Minnesota Statute 152.021.2(a)(1) of which the Defendant had been charged reads as follows:

Possession crimes. (a) A person is guilty of a controlled substance crime in the first degree if:

- (1) the person unlawfully possesses one or more mixtures of a total weight of 50 grams or more containing cocaine or methamphetamine;
- (2) the person unlawfully possesses one or more mixtures of a total weight of 25 grams or more containing cocaine or methamphetamine and:
 - (i) the person or an accomplice possesses on their person or within immediate reach, or uses, whether by brandishing, displaying, threatening with, or otherwise employing, a firearm; or
 - (ii) the offense involves two aggravating factors;
- (3) the person unlawfully possesses one or more mixtures of a total weight of 25 grams or more containing heroin;
- (4) the person unlawfully possesses one or more mixtures of a total weight of 500 grams or more containing a narcotic drug other than cocaine, heroin, or methamphetamine;
- (5) the person unlawfully possesses one or more mixtures of a total weight of 500 grams or more containing amphetamine, phencyclidine, or hallucinogen or, if the controlled substance is packaged in dosage units, equaling 500 or more dosage units; or
- (6) the person unlawfully possesses one or more mixtures of a total weight of 50 kilograms or more containing marijuana or Tetrahydrocannabinols, or possesses 500 or more marijuana plants.

Elements of a Controlled Substance Crime:

- 1) The Defendant knowingly possessed one or more mixtures of a total weight of 50 grams or more containing methamphetamine.
 - a. The Court finds in the present case, investigators recovered in total 934.4 grams of methamphetamine that was located on the property. That specific amount is noted in the Statement of Probable Cause of the Complaint filed on April 28, 2020. The Defendant did not provide any evidence nor testimony to refute the findings and stipulated to the entry of the evidence provided by the State. Here the Court finds this element has been met.
- 2) The Defendant knew or believed that the substance possessed was a controlled substance.

- a. The Court heard testimony from the Defendant admitting to the possession of the methamphetamine and other drugs that were recovered from the Defendant's property on April 24, 2020 during the Court Trial. The Court finds the Defendant knew or believed that the substance possessed was a controlled substance. This meets this element.
- 3) The Defendant's possession of Methamphetamine was without lawful authority.
 - a. The Court finds that that a reasonable person would know that it is illegal to possess Methamphetamine, other drugs and paraphernalia. Here, the Court concludes that the Defendant was aware that the possession of methamphetamine was without lawful authority thus meeting this element.
- 4) The Defendant's act took place on or about April 24, 2020 in Morrison County.
 - a. The Court finds this Element has been met.

The Court finds through the evidence admitted to the Court by the State, that law enforcement found in total 934.4 grams of methamphetamine, as well as cocaine, Oxycodone, marijuana and suspected Ecstasy/MDMA as well as other cash and drug related paraphernalia that the Defendant knowingly and unlawfully possessed over 50 grams of Methamphetamine, a controlled substance as of the date of April 24, 2020 in Morrison county.

CONCLUSIONS OF LAW

The Court finds that the evidence found exceeds the required threshold in meeting the elements of the crime for which the Defendant was charged by the State. Therefore, based on the testimony, evidence and the law, the Court find the Defendant, Robert John Virnig, Guilty of 1st Degree Controlled Substance Crime – Possess 50 Grams or More – Cocaine or Methamphetamine under Minnesota Statute 152.021.2(a)(1), with reference to 152.021.3(a).