IN THE COURT OF APPEALS OF IOWA

No. 1-425 / 10-1556
Filed July 27, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ALLEN HARRIS MCGINNESS, IV,
Defendant-Appellant.

Appeal from the Iowa District Court for Webster County, Kurt L. Wilke (motion to dismiss) and William C. Ostlund (trial and sentencing), Judges.

Allen McGinness IV appeals the dismissal of his motion to dismiss pursuant to Iowa Rule of Criminal Procedure 2.33(2)(*a*). **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, and Ricki N. Osborn, County Attorney, for appellee.

Considered by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

TABOR, J.

In challenging his conviction for conspiracy to manufacture more than five grams of methamphetamine, Allen McGinness IV argues the State missed its forty-five-day deadline to file a speedy indictment under Iowa Rule of Criminal Procedure 2.33(2)(*a*). He contends that peace officers arrested him on December 11, 2009, when they discovered what they suspected to be a clandestine laboratory at his residence. Prosecutors did not file a trial information until May 6, 2010.

Without the benefit of the Iowa Supreme Court's recent ruling in *State v. Wing*, 791 N.W.2d 243 (Iowa 2010), the district court denied McGinness's motion to dismiss, finding that "proof of purpose to arrest" was lacking. Because *Wing* directs us to consider "whether a reasonable person in the defendant's position would have believed an arrest occurred," *Wing*, 791 N.W.2d at 249, we find that the district court erred in concluding McGinness was not "arrested" for speedy indictment purposes. A reasonable person would believe he was under arrest after being placed in handcuffs, forced to undergo a decontamination procedure, provided only paper clothing on a cold winter night, transported to the police station in handcuffs, and shackled to the wall while awaiting an interview.

I. Background Facts and Proceedings

At approximately 10 p.m. on December 11, 2009, police responded to a call from a MidAmerican Energy employee, who reported he had been dispatched to an apartment concerning a strange odor. The apartment residents refused to grant him entry. When Lieutenant Dennis Mernka of the Fort Dodge

Police Department arrived at the scene, he immediately noticed the strong smell of ether outside the residence. Police also found shells from lithium batteries outside the back door. Based upon Mernka's training, experience, and observations, he believed a clandestine methamphetamine lab was being operated on the premises.

McGinness and Jose Daniel Sanchez-Perez were sitting in the doorway and allowed Mernka to enter the residence to look for the MidAmerican Energy employee. Mernka located the employee in the basement of the home and for safety reasons ordered him to leave immediately. The police then contacted Bryant Strouse, an agent with the Iowa Division of Narcotics Enforcement, to come to the scene. Agent Strouse is certified to clean up methamphetamine labs and prepare evidence for Iowa Division of Criminal Investigation (DCI) laboratory analysis.

A third person, Jessica Hanson, was inside the residence. At the request of the police, Hanson, McGinness, and Perez signed a "permission to search" form, allowing the police to look for dangerous chemicals. The police handcuffed the suspects during the search. Mernka testified that handcuffing suspects is a standard procedure to ensure the safety of the officers on the scene.

Mernka testified he told the three suspects they were not under arrest and likely would not be placed under arrest that evening. Both Mernka and Strouse testified that methamphetamine lab suspects are typically not arrested at the time a lab is discovered because the police send the evidence to the DCI laboratory for testing, and the DCI laboratory was experiencing a backlog of cases resulting

in a six-month delay in returning results. These witnesses testified that police wait until test results conclusively determine the evidence is methamphetamine before making arrests.

The suspects deny being told they were not under arrest and claim that they assumed they were under arrest when they were handcuffed. McGinness testified "[a]t that point I figured [I was] under arrest . . . I've never been in handcuffs and been allowed to leave." Mernka confirmed that he did not tell the suspects they were free to leave. Weighing the conflicting testimony, the district court concluded "that more likely than not the defendants were advised they were not under arrest."

After approximately thirty minutes, during which time police searched the residence, Mernka told the suspects that whoever had operated the lab would need to be decontaminated. Mernka testified that decontamination is a mandatory procedure when cleaning up a methamphetamine lab, and that the suspects would not have been allowed to leave before being decontaminated. None of the suspects volunteered any information, and Mernka therefore told the suspects that all three would require decontamination. The police then released the suspects from their handcuffs, instructed them to remove their clothing, decontaminated them in the kitchen, moved them to the back porch, and gave them paper jumpsuits to wear. After completing the decontamination, the police again handcuffed the suspects.

The police would not allow the suspects to re-enter the residence after the decontamination because of the continuing search and clean-up efforts.

Conducting interviews outside the residence was undesirable due to the cold weather and the paper clothing worn by the suspects. Therefore, at around 11 p.m., police took the suspects to the station to conduct interviews. The police transported the suspects in handcuffs. Officers testified that police protocol required suspects to be handcuffed while in a police vehicle, but police did not communicate this fact to the suspects. The police did not allow the suspects to retrieve their clothing, cellular telephones, identification, or money from inside the house before leaving for the station.

At the station, police handcuffed McGinness and Sanchez-Perez to a wall in the waiting area, and allowed Hanson to sit, handcuffed, in a chair. Immediately before the interviews, Sergeant Joel Lizer told the suspects that he did not know whether they would be charged that night because his supervising officer would make that decision after the completion of the interviews. Sergeant Lizer read the suspects their Miranda warnings and the suspects signed waivers. Sergeant Lizer then interviewed the suspects, one at a time. Police removed each suspect's handcuffs during the interview, but upon completion of each interview, the suspect was again handcuffed.

After the interviews, Sergeant Lizer spoke with his superior, who advised Sergeant Lizer that the suspects would not be charged at that time and were free to go. The police released the subjects shortly after midnight, though Sanchez-Perez was arrested on an outstanding warrant before he left the building. McGinness spent the rest of the evening in the police station waiting room, as he did not have his phone, clothes, or wallet and had been told he could not return

to his residence until police completed the decontamination process, which was not until five or six a.m.

Based upon the evidence collected on December 11, 2009, DCI criminalists issued their report on March 31, 2010, confirming the lab had produced methamphetamine. Police arrested McGinness on April 29, 2010 and the State filed a trial information against McGinness on May 6, 2010. On June 16, 2010, McGinness sought dismissal for lack of speedy indictment, pursuant to Iowa Rule of Criminal Procedure 2.33(2)(*a*), which requires an indictment be filed within forty-five days of an arrest. McGinness's motion claimed he was arrested on December 11, 2009. In its resistance, the State contended McGinness was not arrested until April 29, 2010.

After a hearing on July 7, 2010, the district court concluded McGinness's detention on December 11, 2009, was not an arrest and denied his motion to dismiss. The district court also stated, "The State did not raise the issue of good cause delay in these motions, but had the State done so this court finds the unavoidable delay in the DCI Laboratory analysis to be compelling." Following a trial on the minutes of testimony, the district court found McGinness guilty of conspiracy to manufacture more than five grams of methamphetamine. McGinness appeals the denial of his motion to dismiss.

II. Scope and Standard of Review

"We review a district court's decision regarding a motion to dismiss for lack of speedy indictment for correction of errors at law." *Wing*, 791 N.W.2d at

246. "We are bound by the findings of fact of the district court if they are supported by substantial evidence." *Id*.

III. Analysis

A. Preservation of good cause argument

On appeal, the State argues that if the police arrested McGinness on December 11, 2009, the six-month DCI processing lag was good cause for the delay in filing a trial information. Iowa Rule of Criminal Procedure 2.33(2)(*a*) provides,

> When an adult is arrested . . . and an indictment is not found against the defendant within 45 days, the court must order the prosecution to be dismissed, *unless good cause to the contrary is shown*.

(Emphasis added.) McGinness asserts the issue is not properly before us because the prosecution did not argue good cause for the delay in the district court.

The district court confirmed "[t]he State did not raise the issue of good cause delay." The district court further stated *"but had the State [raised the issue]* this court finds the unavoidable delay in the DCI Laboratory analysis to be compelling . . . . On the issue of good cause delay this court *would* rule in favor of the State." (Emphasis added.) We view the district court's statements regarding good cause to be advisory, and insufficient to preserve the State's argument.

Although we may uphold a district court ruling on a ground other than the one upon which the district court relied, we do so only if the ground was urged in that court. *DeVoss v. State*, 648 N.W.2d 56, 61 (Iowa 2002). This rule helps to

ensure that appellate courts are provided with an adequate record, by which they may review errors purportedly committed during trial. *Id.* at 60. This rule also protects the parties by preventing one party from "ambushing" another by raising issues on appeal that the party did not raise in the district court. *Id.* at 63.

In our review of the district court record, we are unable to find any mention of good cause. The lack of argument regarding good cause hinders our ability to analyze that issue. Because the State did not raise the issue of good cause in the district court, McGinness did not receive notice that he needed to present testimony or argument to rebut a claim for good cause. Accordingly, we do not consider the State's argument for good cause on appeal.

B. Arrest

The question we must answer is whether the police arrested McGinness on December 11, 2009. Our supreme court has established that whether a person is arrested for speedy indictment purposes must be determined on a case-by-case basis without the assistance of any bright-line rule or test. *Wing*, 791 N.W.2d at 248 (citing *State v. Dennison*, 571 N.W.2d 492, 495 (Iowa 1997)).

The word "arrest" is derived from the French "arreter," meaning to stop or stay, as signifies the restraint of a person. *State v. Barker*, 372 N.E.2d 1324, 1328 (Ohio 1978). The Iowa Code defines arrest as "the taking of a person into custody when and in the manner authorized by law, including restraint of the person or the person's submission to custody." Iowa Code § 804.5 (2009). "It has been said that an assertion of authority and purpose to arrest followed by

submission of the arrestee constitutes an arrest." *State v. Johnson-Hugi*, 484 N.W.2d 599, 601 (Iowa 1992) (citations omitted). The code also provides,

> The person making the arrest must inform the person to be arrested of the intention to arrest the person, the reason for arrest, and that the person making the arrest is a peace officer, if such be the case, and require the person being arrested to submit to the person's custody, except when the person to be arrested is actually engaged in the commission of or attempt to commit an offense, or escapes, so that there is no time or opportunity to do so . . . .

Iowa Code § 804.14. In accordance with this provision, what police tell a suspect about his or her arrest status is an important factor in determining whether an arrest occurred. *Wing*, 791 N.W.2d at 248. The purpose of our analysis of the arresting officer's communication is not to assess the officer's subjective intent; rather, it is determine if the suspect received notice that he or she was being arrested. *Id.* at 248-49.

But section 804.14 does not require an arresting officer to use formal words communicating an arrest and the court has recognized that "not all seizures by law enforcement officers must meet such strict conditions to constitute an arrest." *Id.* at 248.

> When an arresting officer does not follow the protocol for arrest outlined in section 804.14 and does not provide any explicit statements indicating that he or she is or is not attempting to effect an arrest, we think the soundest approach is to determine whether a reasonable person in the defendant's position would have believed an arrest occurred, including whether the arresting officer manifested a purpose to arrest.

Id. at 249. The court compared this reasonable person analysis to the way courts analyze whether a person has been seized for Fourth Amendment purposes. *Id.*

In instances when we must employ a reasonable person test to determine if an arrest has taken place, we consider whether a person has been handcuffed. *Dennison*, 571 N.W.2d at 495. In addition, the "mere submission to authority" does not result in an arrest. *Id.* at 494-95. Finally, the question of whether an arrest has occurred does not turn solely on whether a reasonable person would have felt free to leave during the encounter. *Johnson-Hugi*, 484 N.W.2d at 601. As stated previously, no one factor is determinative. *Wing*, 791 N.W.2d at 248.

The Iowa Supreme Court recently applied these principles in *Wing*, deciding that a reasonable person in the defendant's position would have believed an arrest occurred when the car in which he was riding was stopped for a routine traffic violation, police found a large brick of marijuana, and, after he admitted ownership, he was patted down, handcuffed, and placed in a patrol car. *Id.* at 252. At that point, a detective asked for and received permission to search Wing's house. *Id.* at 245. Officers removed Wing's handcuffs before transporting him to his house. *Id.* During the search of his house, Wing agreed to cooperate with law enforcement in other drug investigations. *Id.* The encounter with police ended when the detective provided Wing with an inventory of seized items and a business card. *Id.*

The *Wing* court noted evidence that the detective involved in the drug investigation only planned to arrest Wing if police could not secure his cooperation in other investigations. *Id.* at 252. The detective did not articulate this plan to Wing. *Id.* The supreme court held that an officer's subjective intent is

not controlling in determining whether a reasonable person in the defendant's position would have believed he was under arrest. *Id.* at 248.

Because the district court issued its decision denying the motion to dismiss before the supreme court decided *Wing,* the district court placed an undue emphasis on the "thoughts of the law enforcement officers" when determining whether they had the "purpose to arrest." Even if the law enforcement officers did not intend to arrest McGinness until the DCI lab results were available, that subjective and unspoken intent does not control the question of whether an arrest occurred if a reasonable person in the defendant's position would read the officer's conduct as manifesting an intent to arrest. *See Wing*, 791 N.W.2d at 257 (Cady, J., dissenting) ("The majority literally places the power to commence a criminal prosecution in the hands, or mind, of the accused.").

In examining the facts of this case, we first analyze the communication between the police and McGinness in regard to his arrest status. In doing so, we recognize that actions sometimes speak louder than words. Police communication to a suspect that he or she is not under arrest may be nullified if subsequent police action objectively demonstrates that the suspect is under arrest.

Mernka testified that when he was obtaining permission to search, he told the suspects several times they were not under arrest, though Mernka also testified he did not tell them they were free to leave. McGinness, Hanson, and Perez all testified that no one informed them they were not under arrest. The

district court concluded "more likely than not the defendants were advised they were not under arrest."

We do not accord great deference to the district court's tepid credibility finding. But even if we were to credit Mernka's recollection, we do not find that telling McGinness before the search at his residence he was not under arrest would lead a reasonable person in his position to maintain the belief that he was not under arrest when he was handcuffed, made to wait for the search, then stripped down, decontaminated, provided with paper clothing, re-handcuffed, and transported to the police station to be interviewed. While we understand that the decontamination process is a legitimate safety measure when dealing with methamphetamine laboratories and is not by itself an indicia of arrest, in this case the process extended the time the suspects spent in handcuffs and left them without access to their clothes, cellular telephones, and wallets.

Sergeant Lizer testified that when the suspects arrived at the station, he told all three he did not yet know if they would be arrested, and would not know until he consulted his supervisor after the interviews. McGinness had been in handcuffs for approximately an hour when Lizer made this statement and he remained shackled to the station wall after Lizer's statements. We find Lizer's statements cannot undo the officers' exertion of authority at the scene, during transport to the station, and while the suspects were waiting to be interviewed, or McGinness's submission to that authority.

Because we conclude the police communication was unclear and the police asserted their authority in numerous ways, we utilize the standard of a

reasonable person in the defendant's position in this case. Assessing the events of December 11, 2009, under this standard, several facts support the conclusion that an arrest occurred. The police exerted their authority over McGinness by handcuffing him, decontaminating him, taking his clothing, re-handcuffing him, preventing him from retrieving his possessions, placing him in a police vehicle, and chaining him to the wall at the station. McGinness submitted to all of these demonstrations of authority. All of these actions are consistent with the definition of arrest in section 804.5.

While law enforcement officers have limited authority to detain suspects during a search and the use of handcuffs in such situations does not necessarily mean an arrest has occurred, under the reasonable person standard, the actions in this case exceed mere custody. Police testified that handcuffing suspects during searches, decontaminations, and car rides is standard procedure to ensure safety. But it does not appear from the record that police communicated this information to the suspects. In *Wing*, police handcuffed the defendant only briefly before the ride to his house. 791 N.W.2d at 245. Still, the court held that Wing had been arrested. *Id.* at 252. In total, McGinness remained handcuffed for around two hours. Under the analysis in *Wing*, the duration of the time that police restrained McGinness with handcuffs supports a conclusion that a reasonable person in his position would have perceived that law enforcement intended to make an arrest.

Furthermore, in *Wing*, the defendant acknowledged ownership of a large amount of marijuana and knew the police had probable cause for his arrest. *Id.*

In this case, the suspects knew police had discovered a methamphetamine lab, and therefore knew the police had probable cause for their arrest. This knowledge, coupled with the actions of the police, would lead a reasonable person in the defendant's position to conclude he was under arrest.

Although the suspects consented to the search and to give interviews, this consent does not negate the fact that the suspects were objectively under arrest. The State acknowledges that the record is not clear whether McGinness was asked or told to go to the station for an interview. Removal of a suspect from the scene to the police station generally signals an arrest. *Cf*. *State v. Bradford*, 620 N.W.2d 503, 507 (Iowa 2000) (finding no such thing as a *Terry* transportation). In addition, police had taken the suspects' clothing and would not allow the suspects to re-enter the residence to retrieve their cellular telephones or wallets. The police did not tell the suspects they were free to leave. Standing outside in winter, wearing paper clothing, and handcuffed, a reasonable person would believe he was under arrest. Again, even if we accept that Mernka told the suspects they were not under arrest, the demonstrations of police authority in this case objectively establish that the suspects were arrested.

Considering all of the factors discussed above, we hold that police arrested McGinness on December 11, 2009. Therefore, the State filed the trial information outside the forty-five day period provided in rule 2.33(2)(*a*). Accordingly, we vacate the decision of the district court, reverse the conviction, and remand for entry of a dismissal.

REVERSED AND REMANDED.