IN THE COURT OF APPEALS OF IOWA

No. 1-628 / 10-1647
Filed September 8, 2011

STATE OF IOWA,
        Plaintiff-Appellee,

vs.

ARMANDO GARCIA, JR.,
        Defendant-Appellant.
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Appeal from the Iowa District Court for Warren County, Kevin A. Parker (motion to dismiss) and Richard B. Clogg (trial and sentencing), District Associate Judges.

A defendant appeals his judgment and sentence, contending, among other things, that his right to a speedy indictment was violated. **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Vidhya K. Reddy, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, John Criswell, County Attorney, and Tiffany Kragnes, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Tabor, JJ.

VAITHESWARAN, J.

Armando Garcia Jr. appeals his judgment and sentence for possession of not more than fifty kilograms of marijuana with intent to deliver. He contends his right to a speedy indictment was violated.

I. Background Facts and Proceedings

Garcia arranged to have a parcel containing bricks of marijuana mailed to a friend in Des Moines. Garcia was arrested and charged with several crimes in Polk County. He pled guilty to one of the Polk County charges and was sentenced.

While in custody in Polk County, law enforcement officers searched Garcia's home in Warren County and found approximately 387 grams of packaged marijuana.

On November 25, 2009, an officer executed two "citation and complaint" forms charging Garcia with possession of a controlled substance with intent to deliver and failure to affix a drug tax stamp. The forms were filed with the Warren County Clerk of Court on December 15, 2009. On the same date, an arrest warrant was issued based on the filing of the complaint. The warrant was not served until April 22, 2010. A trial information was filed in Warren County on May 3, 2010, charging Garcia with possession of a controlled substance with intent to deliver and failure to affix a drug tax stamp.

Garcia moved to dismiss the counts, claiming in part that his right to a speedy indictment had been violated. The district court denied the motion after which Garcia waived his right to a jury trial and agreed to submission of the first

count on the minutes of testimony. The second count, relating to the failure to affix a drug tax stamp, was dismissed by agreement. The court found Garcia guilty of possession of a controlled substance with intent to deliver and imposed sentence. This appeal followed.

II.   *Speedy Indictment Rule*

The speedy indictment rule provides:

> When an adult is arrested for the commission of a public offense . . . 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 or the defendant waives the defendant's right thereto.

Iowa R. Crim. P. 2.33(2)(*a*). The term "arrest" includes a citation in lieu of arrest. Iowa Code § 805.1(4) (2009) ("The issuance of a citation in lieu of arrest shall be deemed an arrest for the purpose of the speedy indictment requirements of rule of criminal procedure 2.33(2)(*a*), Iowa court rules.") The term "indictment" includes a trial information. *State v. Lies*, 566 N.W.2d 507, 508 (Iowa 1997).

Garcia contends the district court erred in denying his motion to dismiss the Warren County trial information on speedy indictment grounds. He claims he was "constructively arrested" when citations in lieu of arrest were issued, and the trial information was filed more than forty-five days after that date.

Initially, we note that this precise argument was not raised in the district court. Although Garcia cited the speedy indictment rule, he did not cite section 805.1(4), the provision that deems a citation in lieu of arrest an arrest for purposes of the rule. Because this issue was not raised, we review it under an ineffective-assistance-of-counsel rubric, as alternately requested by Garcia.

To prevail, Garcia must show that counsel (1) breached an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). While we generally preserve ineffective-assistance-of-counsel claims for postconviction relief proceedings, we find the record adequate to decide this issue. *See State v. Williams*, 574 N.W.2d 293, 300 (Iowa 1998) (evaluating an ineffective-assistance-of-counsel claim relating to a claim that "counsel was ineffective in failing to move to have the charges against him dismissed on the basis of pre-accusatorial delay" on direct appeal).

As noted, two "police citation and complaints" were filed in Warren County on December 15, 2009.[1] The State did not file a trial information in Warren County until May 3, 2010. This was well past the forty-five day deadline prescribed by Rule 2.33(2)(*a*).

On our de novo review, we conclude Garcia's attorney breached an essential duty in failing to move for dismissal on the ground that the Warren County trial information was filed more than forty-five days after the filing of the citations and complaints. We further conclude that had counsel made the argument, there is a reasonable probability that the trial information would have been dismissed. For that reason, Garcia has also established *Strickland* prejudice.

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[1] Garcia asks us to use the date the citations were signed by the officer, November 25, 2009. However, the record does not disclose what happened to the citations between the date of signing and the date they were filed. Accordingly, we decline to use the earlier date. Instead, we use the December 15, 2009, the date the citations were filed with the court as they became a matter of public record at this point. Garcia was on constructive notice of the citations as of December 15, 2009.

In reaching this conclusion, we have considered the fact that the citations and complaints did not include the statutorily required time and place for a court appearance and Garcia's signature, and they also may or may not have been given to Garcia.[2] *See* Iowa Code § 805.2, .3. These deficiencies may be problematic in other contexts, but they do not alter the fact that the citations were filed and were the starting point for the prosecution of Garcia in Warren County.

We have also considered the State's argument that because Garcia was in custody on the Polk County charges at the time the complaint was filed, the citation was not used "in lieu of arrest or in lieu of continued custody" but was "merely used by the officer to file the charge." We are not persuaded by this argument. A citation in lieu of arrest is a procedure to avoid taking a suspect of a relatively minor violation into custody. *State v. Snider*, 522 N.W.2d 815, 817 (Iowa 1994). A citation in lieu of continued custody assumes the person has already been placed under arrest. *See United States v. Coats*, 335 F. Supp. 2d 871, 874 (W.D. Tenn. 2004). In either case, it matters little where the suspect is physically located when the citation is filed. What matters is that the citation is the process used to begin the prosecution. *See* Iowa Code § 805.1(4). In this case, the citations were filed against Garcia "in lieu of continued custody" in Polk County. Accordingly, they triggered the time for calculating the speedy indictment deadline. *See id.*

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[2] The record contains the prosecutor's copy of the complaints and the court's copy of the complaints, but not Garcia's copy. Garcia suggests that this indicates he received his copy. We need not resolve this factual question in order to decide the speedy indictment question because we believe the filing of the complaint triggered the speedy indictment rule.

We conclude trial counsel was ineffective in failing to move for dismissal based on the filing of the citation on December 15, 2009. We reverse and remand for an order of dismissal. *See State v. O'Bryan*, 522 N.W.2d 103, 106 (Iowa Ct. App. 1994). In light of our disposition, we find it unnecessary to address the remaining issues raised by Garcia.

REVERSED AND REMANDED.