IN THE COURT OF APPEALS OF IOWA

No. 1-669 / 10-1911
Filed November 9, 2011

ROGER B. ENNENGA,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Carla T. Schemmel, Judge.

An applicant appeals from the district court's dismissal of his application for postconviction relief. **AFFIRMED.**

Gary Dickey of Dickey & Campbell Law Firm, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kyle P. Hanson, Assistant Attorney General, John P. Sarcone, County Attorney, and Jaki Livingston, Assistant County Attorney, for appellee State.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ. Tabor, J., takes no part.

VOGEL, P.J.

In 2006, Roger Ennenga pleaded guilty to eluding in violation of Iowa Code section 321.279(3)(b) (2005). In September 2009, Ennenga filed an application for postconviction relief. He appeals from the district court's denial of his application, raising an ineffective-assistance-of-counsel claim. Because we find that even if his trial counsel had made a motion to dismiss pursuant to Iowa Rule of Criminal procedure 2.33(2)(*a*), that motion would not have been successful. Consequently, Ennenga cannot prevail on his ineffective-assistance-of-counsel claim. We affirm.

I. Background Facts.

The postconviction-relief record demonstrates the following: On December 23, 2005, a police officer filed a criminal complaint charging Ennenga with eluding and possession of a controlled substance. Ennenga posted bond and was ordered to appear on January 3, 2006, but he did not appear for that hearing. Ennenga was arrested again on January 10, 2006, and an initial appearance was scheduled for the following day. On January 11, 2006, Ennenga appeared for his initial appearance and a preliminary hearing was scheduled for January 20, 2006.

On January 20, 2006, Ennenga was arraigned. The district court signed the trial information, which charged Ennenga with eluding in violation of Iowa Code section 321.279(3)(b) and possession of a controlled substance (methamphetamine) in violation of Iowa Code section 124.401(5). Ennenga's trial counsel also signed the trial information. Ennenga was provided with a copy of the trial information, with the minutes of evidence attached. The arraignment

order stated that a trial information was filed and scheduled a pre-trial conference for February 16, 2006, and a trial for March 15, 2006. However, the trial information was not filed with the clerk of court until February 17, 2006.

On March 2, 2006, the State amended the trial information to include a habitual offender enhancement pursuant to Iowa Code section 902.8. On March 3, 2006, pursuant to a plea agreement, Ennenga pleaded guilty to the eluding charge, and the State did not pursue the habitual offender enhancement and dismissed the possession of a controlled substance charge.

Ennenga's trial counsel later testified that it was the normal procedure to receive a copy of the trial information without a file stamp and there were no procedures in place to check if the trial information had actually been filed with the clerk of court. He also explained that after he received the trial information, he began investigating whether there was sufficient evidence to lead to Ennenga's conviction.

In September 2009, Ennenga filed an application for postconviction relief. Following a hearing, the district court found that Ennenga's trial counsel was not ineffective and denied Ennenga's application.

II. Ineffective-Assistance-of-Counsel Claim.

We review ineffective-assistance-of-counsel claims de novo. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008). In order to prevail on an ineffective-assistance-of-counsel claim, an applicant must show by a preponderance of the evidence that (1) his trial counsel failed to perform an essential duty and (2) prejudice resulted. *Kirchner v. State*, 756 N.W.2d 202, 204 (Iowa 2008). A defendant's inability to prove either element is fatal and therefore, we may

resolve a claim on either prong. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003).

Ennenga asserts his counsel was ineffective for failing to file a motion to dismiss pursuant to Iowa Rule of Criminal Procedure 2.33(2)(*a*). Iowa Rule of Criminal Procedure 2.33(2) (Speedy Trial) provides,

> It is the public policy of the state of Iowa that criminal prosecutions be concluded at the earliest possible time consistent with a fair trial to both parties. . . .
>
> a. 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.

Ennenga argues that a motion to dismiss would have been granted and cites to *State v. Schuessler*, 561 N.W.2d 40 (Iowa 1997). In *Schuessler*, after the defendant received citations in lieu of arrest for traffic violations, forty-five days later the district court approved the trial information and forty-six days later the trial information was filed with the clerk of court. 561 N.W.2d at 41–42. The supreme court explained that the purpose behind the speedy indictment rule was for "criminal prosecutions to be concluded at the earliest possible time consistent with a fair trial to both parties," as well as to "apprise the defendant of the crime charged so that the defendant may have the opportunity to prepare a defense." *Id.* at 42. If a trial information was "found" based solely upon the court's approval, then a trial information could be found without a record in the clerk's office and therefore, any notice to the defendant. *Id.* The court concluded that "an indictment cannot be 'found' strictly upon the court's approval of the trial information." *Id.* Therefore, the court stated a trial information must be approved

and filed in order to be "found" and "the file date is the date by which to determine whether an indictment has been 'found' within forty-five days of defendant's arrest for purposes of [rule 2.33(2)(*a*)]." *Id.*

Recently, the supreme court again explained the purpose of the speedy indictment rule as part of the speedy trial rule:

> The speedy indictment rule, and its counterpart, the speedy trial rule articulated in rule 2.33(2)(*b*), implement federal and state constitutional speedy trial guarantees. The purpose of both the criminal procedural rules and the constitutional provisions is to "relieve an accused of the anxiety associated with a suspended prosecution and provide reasonably prompt administration of justice." The speedy indictment and speedy trial rules also aim to prevent the harm that arises from the "possible impairment of the accused's defense due to diminished memories and loss of exculpatory evidence." This type of harm is the "most serious," because "the inability of a defendant adequately to prepare his case skews the fairness of the entire system."

State v. Wing, 791 N.W.2d 243, 246–47 (Iowa 2010) (internal citations omitted).

The present circumstances differ from *Schuessler*, namely because the fundamental purposes of the speedy indictment rule were met. Within forty-five days of his arrest, Ennenga was arraigned. At that time, not only was the trial information approved by the trial court, but Ennenga received a copy of it with the attached minutes of evidence, and his trial counsel proceeded to investigate the charges. Ennenga was timely apprised of the charges so that he had the opportunity to adequately prepare a defense. *See Wing*, 791 N.W.2d 246–47 (Iowa 2010); *Schuessler*, 561 N.W.2d at 42. Further, all parties and the court functioned as if the trial information had actually been filed, and the court scheduled a pretrial conference and trial in accordance of the speedy trial rule. *Wing*, 791 N.W.2d 243, 246–47; *Schuessler*, 561 N.W.2d at 42. Although the

trial information was not actually filed with the clerk of court within forty-five days of Ennenga's December 2005 arrest, this clerical or technical mistake would not have resulted in the dismissal of the charges. *See State v. Braun*, 495 N.W.2d 735, 741 (Iowa 1993) ("We generally will not reverse on the ground of technical defects in procedure unless it appears in some way to have prejudiced the complaining party or deprived him or her of full opportunity to make defense to the charge presented in the indictment or information."). We find that had Ennenga's trial counsel filed a motion to dismiss pursuant to Iowa Rule of Criminal Procedure 2.33(2)(*a*), that motion would not have been granted. Consequently, Ennenga cannot demonstrate that he suffered prejudice and his ineffective-assistance-of-counsel claim must fail. We affirm.

AFFIRMED.