IN THE COURT OF APPEALS OF IOWA

No. 2-991 / 11-1736
Filed January 9, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DONALD WEMETT,
Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, Randall J. Nigg, District Associate Judge.

Donald Wemett appeals the judgment, conviction, and sentence following a bench trial on a stipulated record finding him guilty of operating while intoxicated. **AFFIRMED.**

Matthew L. Noel, Dubuque, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Kate Cigrand, Legal Intern, Ralph Potter, County Attorney, and Michael Whalen, Assistant County Attorney, for appellee.

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

POTTERFIELD, P.J.

Donald Wemett appeals following his judgment, conviction, and sentence for operating while intoxicated. He argues the court erred in failing to dismiss his case on two grounds: first, that a prior prosecution in Illinois meant prosecution in Iowa violated the Fifth Amendment and Iowa statutory provisions against double jeopardy; and second, that the charges were not timely filed in violation of the speedy indictment rule.

We affirm, finding the Illinois and Iowa prosecutions were based on two separate offenses, and that the Illinois arrest was not an arrest by an Iowa officer as required to begin the speedy indictment time period.

I. Facts and Proceedings

On January 26, 2009, local police and the Iowa State Patrol were notified that Donald Wemett had broken into a Dubuque, Iowa home to see his estranged wife. He was reported to be intoxicated and driving to East Dubuque, Illinois. Todd Olmstead, an Iowa State Trooper, heard the call and drove to find Wemett near the Julien Dubuque Bridge, which spans the Mississippi river between Dubuque and East Dubuque. Olmstead observed Wemett shortly before he turned onto the bridge and followed him across. Once in Illinois, officers from the East Dubuque police department pulled over Wemett, observed he was intoxicated, and arrested him. Olmstead remained nearby during the stop, and, upon his return to Iowa, filed a report on the incident.

Wemett pled guilty and was sentenced for driving while intoxicated in Illinois. More than a year later, charges were filed against Wemett in Iowa for operating while intoxicated. Wemett filed a motion to dismiss on speedy trial and

double jeapordy grounds. This motion was denied. He renewed the motion, which the court again denied. Wemett waived his right to a jury trial and agreed to a bench trial on a stipulated record. The court found Wemett guilty of operating his vehicle while under the influence. He was sentenced to a two-day jail term to be completed by participating in a community college drinking and driving program. He was also assessed a $1250 fine and court costs. Wemett appeals from these proceedings.

II. Analysis

We review constitutional claims de novo. *State v*. *Bradley*, 637 N.W.2d 206, 210 (Iowa Ct. App. 2001). We review a district court's decision regarding a motion to dismiss for lack of speedy indictment for correction of errors at law. *State v*. *Wing*, 791 N.W.2d 243, 246 (Iowa 2010).

A. Double Jeopardy

Wemett first asserts his prosecution under Iowa law after the Illinois prosecution was a violation of the Fifth Amendment provision against double jeopardy, and Iowa Code section 816.1 (2009). We have previously recognized that one act can be charged as a crime and punished by two different states, without regard to which state makes it to the courthouse first:

> When assessing jurisdiction in criminal matters, courts are governed by the concept of dual sovereignty. Under that doctrine, even if we assume the elements of first-degree murder in Missouri are identical to those of the charge of murder that could have been brought against Bradley in Iowa, each state was free to prosecute the crime without regard to the other. *See Heath v*. *Alabama*, 474 U.S. 82, 88 (1985). In defining its own criminal code, each state exercises its own sovereignty when determining what acts will constitute "an offense against its peace and dignity. . . ." *Id.* at 89. Therefore, a single act delineated a crime by two different states is an offense against each, and may be punished by both. *Id.*

> Enforcing its own criminal laws is a primary function of a state's sovereignty:
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> > To deny a State its power to enforce its criminal laws because another State has won the race to the courthouse "would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines." *Bartkus v*. *People of State of Ill*., 359 U.S. 121, 137 (1959).

State v. *Bradley*, 637 N.W.2d at 215–16 (quoting *Heath v*. *Alabama*, 474 U.S. 82, 93 (1985)) *overruled on other grounds by State v*. *Jenkins*, 788 N.W.2d 640 (Iowa 2010).

Wemett operated his vehicle while intoxicated in Iowa and also in Illinois. Both Iowa and Illinois have enacted laws against operating a vehicle while intoxicated. Iowa Code § 321J.2(1)(a); 625 Ill. Comp. Stat. 5/11-501 (2009). While at some point he did drive across a bridge which may be subject to concurrent jurisdiction, this does not strip a state of its power to prosecute Wemett under its separate law for the offense of driving in its borders while intoxicated. *Heath*, 474 U.S. at 88 ("When a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'"); *accord State v*. *Shafranek*, 576 N.W.2d 115, 118 (Iowa 1998) (holding the same for Iowa Code section 816.1, and noting "the key words in section 816.1 are 'for the same offense.'"). Because Wemett committed two distinct offenses by breaking the laws of both Iowa and Illinois, we find his Fifth Amendment and Iowa Code section 816.1 guarantees against double jeopardy were not violated.

B. Speedy Indictment

Iowa Rule of Criminal Procedure 2.33(2)(a) provides that "[w]hen 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 . . . ." This forty-five day period applies only to the offense for which a defendant is charged. *State v. Sunclades*, 305 N.W.2d 491, 494 (Iowa 1981).

Our supreme court considered the speedy indictment rule in the context of a foreign state arrest in *State v. Gathercole*, 553 N.W.2d 569 (Iowa 1996). In that case, the defendant committed robbery and was found in Utah, where he was arrested as a fugitive on the Iowa charges. *Gathercole,* 553 N.W. 2d at 570–71. The court found Gathercole was not arrested for purposes of the speedy indictment rule until he returned to Iowa, as

> *any* arrest attempted to be made in Utah by an Iowa agent for an Iowa offense would be void. *See State v. Lyrek*, 385 N.W.2d 248, 250 (Iowa 1986) (warrant of arrest issued in one state may not be executed in another); *Drake v. Keeling*, 299 N.W. 919, 922 (1941) (same). The arrest in Utah by the Utah officer was not in any sense an arrest for the Iowa offense; rather, it was based on Gathercole's status as a fugitive from justice. *See Lyrek*, 385 N.W.2d at 250; 31 Am.Jur.2d *Extradition* §§ 23, at 766; 58, at 790 (1989).

Id. at 572. While here an Iowa officer may have watched the arrest, he did not and could not have actually effectuated an Iowa arrest. The arrest of Wemett which did occur was pursuant to his violation of Illinois law, and he was charged under Illinois law. Our speedy indictment period for the Iowa charges therefore was not triggered at that time.

The district court properly denied Wemett's motion to dismiss.

AFFIRMED.