IN THE COURT OF APPEALS OF IOWA

No. 3-105 / 12-0621
Filed March 13, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KELLY LEE WEBER JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer (motion to dismiss) and Bradley J. Harris (motion to suppress, trial, and sentencing), Judges.

Kelly Weber Jr. appeals following judgment and sentences entered upon convictions of conspiracy to distribute a controlled substance, possession with intent to deliver a controlled substance, and failure to affix drug tax stamps. **AFFIRMED IN PART, SENTENCE VACATED IN PART.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brad P. Walz, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ. Bower, J., takes no part.

POTTERFIELD, J.

Kelly Weber Jr. appeals following judgment and sentences entered upon convictions of conspiracy to distribute a controlled substance, possession with intent to deliver a controlled substance, and failure to affix drug tax stamps. He contends (1) the charges should be dismissed because he was not tried within ninety days of his arraignment, (2) the district court erred in denying his motion to suppress because the warrantless search of his vehicle was without probable cause, and (3) the convictions of conspiracy and possession with intent to deliver should merge. Because the trial court did not abuse its discretion in finding good cause for the delay of trial and probable cause and exigent circumstances supported the vehicle search, we affirm Weber's convictions. However, the convictions of conspiracy and possession with intent to deliver merge, and we therefore vacate the conspiracy sentence.

I. Speedy trial.

Kelly Weber Jr. was charged by trial information on July 8, 2011. A written arraignment and plea of not guilty was filed on July 19 wherein Weber "demand[ed] a speedy trial pursuant to Iowa Rule of Criminal Procedure 27(2)(b)" (now numbered rule 2.33(2)(b)).

The court entered an order, filed July 21, 2011, setting a pretrial conference for September 9, which provided that "[p]lea negotiations shall be completed by this date" and "[d]efendant may enter a guilty plea on this date." The order noted Weber was incarcerated in the Black Hawk County Jail.

On September 9, a pretrial conference was held at which the prosecutor and defense counsel appeared. The court entered a form order with a

checkmark by the statement: "Further proceedings shall be held on the 22nd day of Sept., 2011, at 11:30 a.m."

A September 22, 2011 order states that the "matter was scheduled to come before the court on September 22, 2011, at 11:30 a.m. for entry of a guilty plea. Counsel requested that guilty plea proceeding be rescheduled for an additional three weeks."

On October 7, Weber signed a document agreeing to a session of "an informal proffer of information," and based on the information Weber provided, the State would "prepare a proposed agreement that would resolve the pending indictments and investigation."

On October 14, an order was filed stating, "On agreement, plea hearing is reset to Nov. 10, 2011 at 11:30." Two additional continuances by agreement of counsel were entered on November 10 and November 21.

On November 28, Weber filed a pro se motion to dismiss contending he had not waived his speedy trial rights. The State resisted and asked that the motion be considered at the hearing set for "further proceedings" on December 16.

Weber sent a handwritten letter to the court, which was filed on December 16, 2011. The letter reads, in part:

> On or about September 9th, 2011 my attorney and I went over some options. The State was offering me 25 years which is the maximum sentence imposed on my crime. I refused to take the offer. Then my attorney brought it to my attention that someone was willing to talk to me if I wanted a lighter sentence. I agreed to this if it was done in a timely manner.

At the December 16 hearing, defense counsel provided a professional statement expressing some frustration in the time it was taking to reach a plea agreement, and noting Weber and he differed in their assessments of the events. Counsel stated,

> All I know is at this time there's no plea offer, he's not willing to leave the matter set for further proceedings, he wants to set a trial date, he believes he had a right to trial within 90 days, that has been messed up, probably by me. My understanding is that we were on the same page as far as everything that I've done for him—or that was my understanding up until today.

Counsel asked that he be allowed to withdraw and that the court set a trial date.

Weber told the court he had not agreed to "wait this long" for someone to talk with him about a proffer and a plea offer. He asked the court to dismiss the charges or appoint new counsel and set a trial date.

The court asked Weber, "Now, I'm assuming that at this point you understand that—well, earlier you had worked out some type of a potential plea agreement with the State of Iowa that you thought was going to be acceptable and that's why you were willing to talk with this individual, correct?" Weber responded, "Yes, Your Honor." The court stated it would allow defense counsel Michael Lanigan to withdraw and appoint new counsel, and set trial for the first available time—January 3, 2012. "But that would allow you an opportunity to talk to your new counsel, have some of your hearings take place, . . . if that's how you wish to proceed." The court asked Weber if he understood that "by taking this particular procedure, the State is no longer bound to offer you that plea agreement." Weber stated he did.

A written order was filed on December 20, 2011, granting Lanigan leave to withdraw, appointing John Bishop as defense counsel, and setting trial for January 3, 2012.

On December 28, defense attorney Bishop filed a motion to dismiss for lack of speedy trial, asserting it had been 179 days since the filing of the trial information, the State had failed to send someone from law enforcement to speak with the defendant, and there was no good cause for the delay.

On January 3, 2012, the defense requested a continuance of the trial, and a hearing on defense motions was set for January 19.

Following the motion hearing, the district court (Judge Geer) granted an extension of time to file pretrial motions and denied the motion to dismiss. The district court found that the "case was removed from the trial assignment and scheduled for plea proceedings on defendant's motion" and then several times thereafter it was reset to a later date on agreement of the parties. The court determined there was good cause for the delay between September 22 and December 19, 2011, and on December 19, 2011, the ninety-day speedy trial deadline "commenced again." The court also found the delay was attributable to the defendant.

We review a ruling on a motion to dismiss for an abuse of discretion. *State v*. *Winters*, 690 N.W.2d 903, 907 (Iowa 2005).

On appeal, Weber argues the court erred in finding good cause for the delay was attributable to him. Weber contends his execution of the cooperation agreement was not substantially similar to an indication he was pleading guilty

and the delay in arranging a time to meet with law enforcement was attributable to the State.[1]

Iowa Rule of Criminal Procedure 2.33(2)(b) provides:

> If a defendant indicted for a public offense has not waived the defendant's right to a speedy trial the defendant must be brought to trial within 90 days after indictment is found or the court must order the indictment to be dismissed unless good cause to the contrary be found.

"Under this rule, a criminal charge must be dismissed if the trial does not commence within ninety days from the filing of the charging instrument unless the State proves (1) defendant's waiver of speedy trial, (2) delay attributable to the defendant, or (3) good cause for the delay." *Winters*, 690 N.W.2d at 908 (internal quotation marks and citations omitted). "Good cause" focuses on one factor—the reason for delay. *Id.*

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[1] Weber argues this case is analogous to *State v*. *Wing*, 791 N.W.2d 243, 252 (Iowa 2010), where the defendant was subjected to a traffic stop and law enforcement "planned to arrest Wing only if his cooperation in other investigations could not be secured." Charges against Wing were dismissed because our supreme court concluded that State failed to file a trial information within forty-five days of circumstances the court found constituted an arrest. *Id.* at 253.

The State responds that the preliminary agreement here is more akin to that addressed in *State v*. *Johnson-Hugi*, 484 N.W.2d 599, 600 (Iowa 1992), where the defendant met with law enforcement in her home and agreed to became a confidential informant but thereafter did not respond to messages. In *Johnson-Hugi*, the court stated,

> Law enforcement authorities must be accorded latitude in procuring the non-volunteer assistance of private citizens to serve as confidential informants in combating crime. If every such action were deemed to be an "arrest" for purposes of rule [of criminal procedure 2.33(2)], the time within which authorities could use informants to obtain information would be substantially limited. We refuse to hamstring law enforcement authorities by such a rule. We therefore conclude as a matter of law that the May 22 meeting between the undercover agents and defendant Johnson–Hugi did not constitute an "arrest" for purposes of rule [2.33(2)(a)]".

Neither case is on point; the question before the court in each case was, where there had been no formal arrest, when did the speedy trial clock begin to run for purposes of Iowa Rule of Criminal Procedure 2.33(2)(a).

The district court found, and we agree, that the case was removed from the trial calendar by the defense to pursue a plea agreement. In *State v. LeFlore*, 308 N.W.2d 39, 41 (Iowa 1981), the court held that the statutory right to speedy trial under rule 2.33(2)(b) may be waived by defense counsel. There the court observed,

> Defense counsel acting within the scope of his or her authority may waive this right on the defendant's behalf without the defendant's express consent. In the present case defense counsel expressly waived defendant's right to a speedy trial; counsel also waived this right by the succession of continuance motions. Defense counsel's action was within the scope of his authority, and the delay caused thereby was in no way attributable to the State.

Though the record is not clear that trial counsel expressly waived Weber's right to a speedy trial as in *LeFlore*, we think the case applies to agreements to continue the case and to schedule guilty plea proceedings.

While delay in law enforcement's meeting with Weber might also be attributable to the State, Weber signed a cooperation agreement indicating he was interested in plea discussions. Weber's first attorney took the case off the trial calendar then sought or agreed to several continuances. These factors point to good cause delay attributable to the defendant. *See also State v. Warmuth*, 532 N.W.2d 163, 166 (Iowa Ct. App. 1995) ("Once a defendant indicates the choice to forego trial by . . . advising the State that a plea of guilty is forthcoming, the case is removed from the trial calendar and the State discontinues trial preparations."). We find no abuse of discretion.

II. Motion to suppress.

The charges against Weber stem from a search of the vehicle in which he was found on June 28, 2011. On December 30, defense counsel Bishop moved

to suppress items seized upon the search of Weber's vehicle. Though acknowledging there were exigent circumstances, Weber asserted the warrantless vehicle search was not supported by probable cause.

A hearing on the motion was held on February 22, 2012, after which the district court (Judge Harris) denied the motion to suppress, finding probable cause supported the search.

Weber claims the district court should have granted his motion to suppress on federal and state constitutional grounds. We review constitutional issues de novo. *See State v*. *Hoskins*, 711 N.W.2d 720, 725 (Iowa 2006).

We make an independent evaluation of the totality of the circumstances to determine whether probable cause existed. *Id.* In our evaluation, we give deference to the factual findings of the district court due to its opportunity to evaluate the credibility of the witnesses, but are not bound by such findings. *Id.*

Probable cause exists to search a vehicle when the facts and circumstances would lead a reasonably prudent person to believe that the vehicle contains contraband. *Id.* at 736. "The facts and circumstances upon which a finding of probable cause is based include the sum total and the synthesis of what the police officer has heard, what the officer knows, and what the officer observes as a trained officer." *Id.* (internal quotation marks, corrections, and citations omitted).

Here, a confidential informant (CI), who had been known to Investigator Adam Galbraith for five years and had provided reliable information on numerous occasions, contacted law enforcement about two men, "Dan" and "Kelly," who were in the Waterloo area to distribute methamphetamine. The CI had obtained

methamphetamine from Dan and Kelly in the past and owed them money. Officer Nicholas Berry of the Tri-County Drug Enforcement Task Force was in a vehicle with the CI on June 28, 2011, when the CI was speaking with Kelly Weber on the phone about a proposed drug transaction.

Because the negotiations between the CI and Weber were protracted, Officer Berry returned to his office to work on a search warrant application for a room at the Extended Stay Inn where Dan was purportedly staying. While at his office, the CI called Officer Berry and reported he was to meet Weber at the Casey's gas station on University. The CI stated Weber would be driving a black Ford Taurus with out-of-county license plates.

After going to two other Casey's locations, officers went to a Casey's gas station that had recently changed ownership and name (it had been a Holiday station). Officer Ryan Bellis observed a black Ford Taurus pull into the Casey's parking lot and park at the far west end, away from the gas pumps and store entrance. The sole occupant of the Taurus did not get out of the vehicle.

Officers then blocked the Taurus in, approached the vehicle, and removed Kelly Weber from the vehicle. A drug dog indicated the presence of drugs in the vehicle. A search of the vehicle found large quantities of methamphetamine under the driver's seat.

Upon our de novo review, we agree with the district court that there was probable cause to believe that contraband would be found in the vehicle. A reliable CI provided information that he was to meet with "Kelly," who would be driving a black Ford Taurus, to conduct a drug transaction. Officer Berry was present and heard portions of drug-related phone calls between the CI and

"Kelly." The CI provided accurate information about the out-of-county plates and the color and type of vehicle "Kelly" would be driving. A vehicle of that description arrived at a location described by the CI, parked, and then the occupant of the vehicle did not purchase gas or enter the gas station for another type of purchase. *See State v. Weir*, 414 N.W.2d 327, 332 (Iowa 1987) (explaining courts making informant credibility determinations for the issuance of a search warrant rely on various factors, one of which is the corroboration of the informant's information). These facts are sufficient to establish a fair probability that illegal drugs would be found in Weber's possession. We therefore affirm the denial of the motion to suppress.

III. Merger.

This matter was tried to the court on the minutes of testimony. The court found Weber guilty as charged and imposed concurrent twenty-five year terms of imprisonment on the possession with intent to deliver and conspiracy counts. On appeal, Weber contends the two sentences should have merged.

"[E]rrors in sentencing may be challenged on direct appeal even in the absence of an objection in the district court. Illegal sentences may be challenged at any time, notwithstanding that the illegality was not raised in the trial court or on appeal." *State v. Lathrop*, 781 N.W.2d 288, 293 (Iowa 2010).

Iowa Code section 706.4 (2011) provides: "A conspiracy to commit a public offense is an offense separate and distinct from any public offense which might be committed pursuant to such conspiracy. A person may not be convicted and sentenced for both the conspiracy and for the public offense." The State contends merger of convictions is not required, however, where different

factual elements support the charges or the charges involve separate acts.

Double jeopardy principles protect defendants against multiple punishments for the same offense. "However, multiple punishments can be assessed after a defendant is convicted of two offenses that are not the same." *State v. Smith,* 573 N.W.2d 14, 19 (Iowa 1997); *see also* 4A B. John Burns, *Iowa Practice Series; Criminal Procedure* § 38:3 (2011 ed.) ("To constitute the same offense for the purpose of invoking the Double Jeopardy Clause, the offenses must be the same act. Separate acts, even charged under the same statute, are not subject to Fifth Amendment analysis."). The district court did not find separate offenses here. In *State v. Maghee*, 573 N.W.2d 1, 7 (Iowa 1997), the court noted "the conspiracy count was an alternative means of violating Iowa Code section 124.401(1), our present drug trafficking statute. Thus, [the defendant] could only be sentenced for a single offense, a violation of section 124.401(1)." We conclude the district court committed error here when it sentenced Weber on both the conspiracy and possession with intent to deliver counts. We vacate the sentence on the conspiracy count, leaving the two other sentences in place. *See Maghee*, 573 N.W.2d at 7 ("We can sever the conspiracy sentence without disturbing the balance of the sentence. We therefore let the balance of the sentence stand.")

AFFIRMED IN PART, SENTENCE VACATED IN PART.