IN THE COURT OF APPEALS OF IOWA

No. 2-595 / 11-0971
Filed September 6, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT LEE PATE JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, D.J. Stovall (motion to dismiss) and Robert B. Hanson (motion to dismiss and motion to compel), Judges.

Robert Pate appeals his conviction for possession of a controlled substance with intent to deliver as a second or subsequent offender. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, John Sarcone, County Attorney, and Stephan K. Bayens, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Doyle and Tabor, JJ.

TABOR, J.

The key issue raised in this appeal is whether dismissal of the State's drug prosecution so the United States Attorney could pursue an indictment for the same conduct was in the furtherance of justice under Iowa Rule of Criminal Procedure 2.33(1). In challenging his conviction for possession of crack cocaine with intent to deliver as a second or subsequent offender, Robert Pate alleges the State denied him the right to a speedy indictment under Iowa Rule of Criminal Procedure 2.33(2) by reinstating its charges after dismissal of the federal prosecution. He also contests the denial of his motion to suppress and motion to compel the identity of a confidential informant. Lastly, Pate contends his trial counsel was ineffective for not asserting the federal suppression ruling was binding on the state court under the doctrine of collateral estoppel.

Because the district court dismissed the original state prosecution in the furtherance of justice, not for speedy trial reasons, the State could reinstate the same charges at a later date with a new forty-five day deadline. The district court correctly denied Pate's motions to dismiss. In addition, we find no error in the district court's analysis of the remaining issues or in trial counsel's performance. Accordingly, we affirm.

I. Background Facts and Proceedings

In the fall of 2007, a confidential informant for the Des Moines police department made three controlled drug buys from a man he knew as "B." On October 4, 2007, peace officers executed a search warrant at the apartment where the transactions took place. They found Pate and a female associate

inside with eighty-one grams of crack cocaine, one and one-half grams of cocaine salt, and five grams of marijuana. Pate also had $900 cash on his person. Officers arrested Pate and the State filed five preliminary complaints against him for controlled substance offenses. Pate made his initial appearance the following day.

The State did not file a trial information based on these preliminary complaints. Instead, on November 13, 2007, the State filed a notice of intent not to prosecute, which read:

> 1. A preliminary Complaint and/or a Trial Information has been filed in the above-captioned matter.
> 2. The County Attorney, after examining the record, talking to the witnesses and taking all things into consideration, declines to prosecute this case because it is in the interest of justice to do so.
> 3. This defendant will be prosecuted by the United States of America.

The notice included an order of dismissal without prejudice, which Polk County District Court Judge Scott Rosenberg signed the same day. The record does not show Pate subsequently filed any response or motion to reconsider the dismissal. Also on November 13, 2007, the federal government indicted Pate on one count of possession with the intent to distribute at least fifty grams of crack cocaine.

Because of a parole revocation in an unrelated state conviction, Pate remained incarcerated in the Newton correctional facility, despite the Polk County district court's dismissal. Pate challenged the validity of the search warrant in the pending federal case and sought disclosure of the confidential informant's identity along with other police records. On February 20, 2009, the federal court

ordered the United States government to provide Pate with certain police records and ordered both parties to submit questions for the court to ask the informant in determining whether an *ex parte in camera* proceeding would be necessary. On March 3, 2009, the federal district court granted the government's motion to dismiss its case under Federal Rule of Criminal Procedure 48(a) without prejudice. Pate remained incarcerated.

The State then revived its prosecution against Pate. On March 12, 2009, it filed complaints identical to those initiated in 2007. Warrants were issued for Pate's arrest. On March 23, 2010, the warden received notice of a detainer action seeking to hold Pate once his unrelated state sentence expired.

On May 26, 2010, the Iowa Board of Parole granted Pate parole. As a condition of parole, Pate was to report to his parole officer "upon release from Des Moines Police Department Custody." Because of the detainer, the warden was to release Pate to the custody of the Des Moines police on August 4, 2010. Pate signed a form acknowledging his receipt of the release instructions on August 3, 2010. On August 5, 2010, Pate made an initial appearance in Polk County district court, and his arrest warrants were recalled.

On September 8, 2010, the State filed its five-count trial information and minutes of testimony. Pate filed a pro se motion to dismiss on September 16, 2010. His counsel filed a separate motion to dismiss on October 16, 2010. They both argued the state prosecution violated deadlines set out in Iowa Rule of Criminal Procedure 2.33. On November 2, 2010, the district court held a hearing on the motions to dismiss. Pate's counsel argued the State's original dismissal

was "not truly in the interests of justice considering what has happened since." The State responded:

> To suggest that the Court was without basis to grant the motion to dismiss by relying on facts and circumstances which occurred after the fact would require the Court, obviously, to divine at the time of granting the motion to dismiss all potential ramifications that could stem from granting it. Clearly that is without merit and is an impossible standard for any court to meet.

The State further argued:

> Clearly a dual prosecution in multiple jurisdictions would not necessarily be in the interests of justice. Predominantly, it would operate to the detriment of the defendant. It would expose him potentially to duplicative punishment, one in the state jurisdiction and one in the federal jurisdiction.

The court overruled both motions to dismiss on November 8, 2010.[1]

Pate stipulated to a trial on the minutes of testimony regarding his charge of possession of crack cocaine with the intent to deliver as a second or subsequent offense in exchange for the State's dismissing the remaining four charges. The State also agreed not to argue for an enhanced sentence of more than seventy years. On May 6, 2011, the court convicted Pate of possession of a controlled substance with intent to deliver as a second or subsequent offender, under Iowa Code sections 124.401(1)(a)(3) and 124.411 (2007), and on June 22, 2011, sentenced him to up to fifty years incarceration.

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[1] On January 28, 2011, the court held a hearing regarding Pate's *pro se* motion to dismiss, motion to disclose the identity of the confidential informant, application for bond review, and his request to change counsel. Pate agreed to continued representation by his attorney, and the court ultimately denied all of Pate's remaining motions.

II. Scope and Standards of Review

We review whether the district court's initial dismissal complied with rule 2.33(1) for legal error. *State v. Taeger*, 781 N.W.2d 560, 564 (Iowa 2010). If it is legally sufficient, we then look to whether the district court abused its discretion in finding dismissal was "in the furtherance of justice." *Id.*; *see State v. Henderson*, 537 N.W.2d 763, 766 (Iowa 1995) (reviewing initial district court's dismissal in furtherance of justice for abuse of discretion when considering appeal of following case). An abuse of discretion exists when the district court exercises discretion on grounds clearly untenable or to an extent clearly unreasonable. *State v. Richards*, 809 N.W.2d 80, 89 (Iowa 2012). We review speedy indictment challenges under rule 2.33(2) for correction of errors at law. *State v. Wing*, 791 N.W.2d 243, 246 (Iowa 2010).

We review alleged violations of constitutional rights de novo. *State v. Hoskins*, 711 N.W.2d 720, 725 (Iowa 2006). We independently evaluate the totality of the circumstances based on our own review of the record. *State v. McConnelee*, 690 N.W.2d 27, 30 (Iowa 2004).

III. Was Pate Entitled to Dismissal under Iowa Rule of Criminal Procedure 2.33(2)?

Pate claims the prosecution violated his right to a speedy indictment under rule 2.33(2)(a).[2] The speedy indictment rule states, in relevant part:

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[2] Pate also refers to a speedy trial violation, but his argument is not sufficiently developed to merit our analysis. *See State v. Mann*, 602 N.W.2d 785, 788 n.1 (Iowa 1999) (declining to consider issue raised by random mention without elaboration or supporting authority).

> 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.

A dismissal under this rule is with prejudice, thereby prohibiting reinstatement of the charges for the same offense. *State v. Utter*, 803 N.W.2d 647, 654 (Iowa 2011). It is a more stringent codification of the constitutional right to a speedy trial.[3] *See* U.S. Const. amend. VI; Iowa Const. art. I, § 10; *see also Ennenga v. State*, 812 N.W.2d 696, 701–02 (Iowa 2012) (tracing Iowa's codification of constitutional right from 1851 legislation to modern-day Iowa Rule of Criminal Procedure 2.33).

Pate's argument builds from the premise that the district court's 2007 dismissal was not in the furtherance of justice under rule 2.33(1).[4] Pate advances various time calculations to show a speedy indictment violation. First, he points to his arrest on October 4, 2007 as the commencement date, and argues the forty-five day deadline expired long before the State filed its trial information on September 8, 2010. Second, he contends the forty days between his October 4, 2007 arrest and the November 13, 2007 dismissal should be counted toward the forty-five-day speedy indictment period—with the clock restarting either when he was granted parole (on May 26, 2010) or when he was released to the Des Moines police (on August 5, 2010).

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[3]For the first time on appeal, Pate argues the delay of more than one year constitutes a Sixth Amendment violation. Because he did not preserve error on this constitutional claim, we do not address the argument.

[4] Pate's appellate brief conflates the concepts of "good cause" and "in the furtherance of justice." Because the district court did not find the trial information was filed more than forty-five days after Pate's arrest, the issue of "good cause" for a delay is not before us.

We first examine the language of rule 2.33(1).

> The court, upon its own motion or the application of the prosecuting attorney, in the furtherance of justice, may order the dismissal of any pending criminal prosecution, the reasons therefor being stated in the order and entered of record, and no such prosecution shall be discontinued or abandoned in any other manner. Such a dismissal is a bar to another prosecution for the same offense if it is a simple or serious misdemeanor; but it is not a bar if the offense charged be a felony or an aggravated misdemeanor.

This rule allows the State to refile the same felony or aggravated misdemeanor charges, triggering a new speedy indictment clock, so long as it provided "appropriate and sufficient reasons" for the original dismissal. *See State v. Abrahamson*, 746 N.W.2d 270, 273 (Iowa 2008). Appropriate reasons for dismissing a prosecution in the furtherance of justice include allowing the State to gather evidence, plea bargain, or procure witnesses. *State v. Lasley*, 705 N.W.2d 481, 492 (Iowa 2005); *see Henderson*, 537 N.W.2d at 766 (finding dismissal based on State's difficulty in serving the victim was in furtherance of justice). The district court may deny a motion under rule 2.33(1) if the prosecution seeks the dismissal in bad faith or has engaged in misconduct. *See Taeger*, 781 N.W.2d at 566. The State must offer more than a cursory explanation for the court to properly dismiss the case under rule 2.33(1). *Id.*

At the outset, we reject Pate's assertion that the nearly three-year gap between the November 2007 dismissal and the September 2010 filing of the trial information shows the dismissal was not in the furtherance of justice. We do not expect a trial court to predict when or why the State may chose to reinitiate charges. Instead, we review the trial court's decision to dismiss based on the facts before it at the time of the State's motion. Here the State provided an

adequate explanation for dismissal by revealing the federal government's intent to prosecute Pate for the same conduct. *See Abrahamson*, 746 N.W.2d at 273. We focus on whether that reason was in the furtherance of justice. *See id.*

The State argues its prosecution was barred by section 124.405, which reads: "If a violation of [the controlled substances] chapter is a violation of a federal law or the law of another state, the conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state." The State's argument overstates the impact of the statute. Because no outside jurisdiction had convicted or acquitted Pate, the provision did not force the dismissal. But the statute does suggest our legislature did not intend for a defendant ultimately to receive duplicative punishment for the same drug offenses in both state and federal court.

In denying Pate's motion to dismiss, the district court did not find "any evidence tending to show the State's earlier dismissal was merely a subterfuge to avoid speedy trial deadlines and not in the furtherance of justice." We agree with the district court's conclusion. The reason for dismissal cited by the State was "compatible with the public interest" in having just one sovereign pursue drug offenses. *See Manning v. Engelkes*, 281 N.W.2d 7, 12 (Iowa 1979) (quoting *United States v. Hastings*, 447 F.Supp. 534, 536–37 (E.D. Ark.1977)). Because the November 2007 dismissal was in the furtherance of justice, the State was free to reinstate its drug prosecution after the federal case closed.

Pate contends that even if the November 2007 dismissal was without prejudice, the forty days before the 2007 dismissal should be added to the time

elapsed between his grant of parole on May 26, 2010 and the filing of the trial information on September 8, 2010, or—at a minimum—to the thirty-five days between August 4, 2010 (when he was taken into custody on the current charges) and September 8, 2010. *See State v. Waters*, 515 N.W.2d 562, 566 (Iowa Ct. App. 1994) (holding a person is not arrested until holding jurisdiction transferred custody to officials of county in which charges were pending).

Pate's reliance on his arrest date from the earlier charges, which were dismissed in the furtherance of justice, runs counter to the holding in *State v. Fisher*, 351 N.W.2d 798, 802 (Iowa 1984): "[T]he language of [rule 2.33(2)] is clear and a dismissal under it starts the proceedings anew for speedy-trial purposes (subject, of course, to statutes of limitation and defenses based upon constitutional grounds or claims such as vexation, abuse, or prejudice)." Recognizing this contrary precedent, Pate argues *Fisher* should be overruled.[5]

We cannot overrule precedent from our supreme court. *See State v. Hughes*, 457 N.W.2d 25, 28 (Iowa Ct. App. 1990). Because *Fisher* holds a dismissal without prejudice does not bank days to be applied to a subsequent arrest, the forty days between Pate's 2007 arrest and the State's dismissal are not credited toward the speedy indictment period in the current case. *See* 351

[5] To further support his reasoning, Pate cites language in *State v. LaSage*, 523 N.W.2d 617, 620 (Iowa Ct. App. 1994) that "[a] dismissal tolls the speedy trial clock," and quotes Black's Law Dictionary 1488 (6th ed. 1990), which defines "toll" as "[t]o suspend or stop temporarily." Toll has multiple definitions, depending on the context. In fact, Pate quotes the second definition for the term. The primary definition is "[t]o bar, defeat, or take away." Black's Law Dictionary 1488 (6th ed. 1990). We believe *LaSage* refers to the primary definition, especially considering its language that "[o]nly when the charges are refilled does the clock start anew." *See* 523 N.W.2d at 620.

N.W.2d at 801 (holding the new charges filed started the time period anew, "despite the fact they were identical to those originally dismissed").

Finally, Pate repeats his trial argument that the State could not "unarrest" him by dismissing the 2007 charges without prejudice, citing *State v. Davis*, 525 N.W.2d 837, 839 (Iowa 1994). *Davis* held when a defendant who is arrested and subsequently released without formal charges being filed, the forty-five day period runs from the date of the arrest. *See* 525 N.W.2d at 841. *Davis* is inapplicable to the instant facts. A peace officer did not attempt to "unarrest" Pate; rather, the county attorney dismissed Pate's case under rule 2.33(1). As the district court point points out, "to apply the Defendant's *State v. Davis* 'unarrest' argument here would render the language in rule 2.33(1) which allows for the State to refile felony charges provided it properly followed the procedures set out for dismissal a nullity." We agree with the district court's reasoning.

Because the 2007 dismissal was in the furtherance of justice, the speedy indictment period runs anew from Pate's August 4, 2010 arrest. *See Fisher*, 351 N.W.2d at 800–01.[6] The State timely filed its trial information on September 8, 2010.

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[6] In his reply brief, Pate tries to distinguish *Fisher* by noting it involved speedy trial rather than speedy indictment violations. For purposes of determining whether the State violated the time period of either rule, speedy trial reasoning applies to the speedy indictment calculation. *See State v. Eichorn*, 325 N.W.2d 95, 96 (Iowa 1982).

III. Did the District Court Properly Deny Pate's Motion to Dislcose the Identity of the Confidential Informant?

The search warrant leading to Pate's arrest referred to a confidential informant who conducted multiple drug transactions in the apartment where officers found Pate. Pate challenges the district court's refusal to compel the State to disclose the name of the informant. He argues learning the identity of the informant was necessary to mount his defense, and to show the search warrant was invalid.

The State's privilege to withhold the identity of confidential informants is justified by "the public interest in maintaining the flow of information essential to law enforcement." *State v. Robertson*, 494 N.W.2d 718, 722 (Iowa 1993). This interest is not absolute; it must be balanced against the defendant's right to prepare and put forth a meaningful defense. *Hoskins*, 711 N.W.2d at 729. The burden to demonstrate the necessity of disclosure rests on the defendant. *Id.* at 730.

We recognize a distinction between an informant who merely provides information to law enforcement and one who is actually a participant or present at the scene of a crime. *State v. White*, 530 N.W.2d 77, 83 (Iowa Ct. App. 1994). In the latter situation, the informant is also a witness, and his or her identity must be divulged. *Id.* No similar requirement exists when the informant does not indirectly or directly provide evidence at trial. *Id.*

We use the *Franks* standard when a defendant challenges the veracity of a search warrant application. *See Franks v. Delaware*, 438 U.S. 154 (1978). In

a *Franks* hearing, the court determines "whether the affiant was purposely untruthful with regard to a material fact in his or her application for the warrant, or acted with reckless disregard for the truth." *State v. Niehaus*, 452 N.W.2d 184, 186 (Iowa 1990). If the affiant consciously falsified information, or recklessly disregarded the truth in the application, the offending material must be excised when considering whether probable cause existed to obtain the warrant. *Id.* at 186–87.

According to the warrant, the informant claimed to purchase crack cocaine from a person known as "B" at the apartment where officers found Pate on October 4, 2007. The informant purchased narcotics from "B" on three occasions before the warrant's execution. During the suppression hearing the prosecutor stated the informant was not present on October 4 or involved with Pate's arrest, and noted the State was not charging Pate with the controlled buys. Pate's defense counsel for the state proceedings relied on information from Pate's federal defense attorney alleging a person named Otis Crayton was the informant, though when deposed Crayton denied the allegation. She suggested someone other than Pate may have been dealing drugs from the targeted apartment, which would have provided an avenue to challenge Pate's confession.

The district court ruled Pate's request for disclosure did not demonstrate the requisite necessity. The court explained: "He merely alleges he might not be the person whom the informant refers to as 'B.' Mere speculation that the

informant may be helpful in preparing the defendant's defense is not enough to overcome the public's interest in maintaining the confidentiality of the informant."

We agree with the district court's analysis. Aside from Pate's contention he may not be the person known as "B," the remainder of his argument rests on unfounded allegations as to the informant's identity. He reasons if the alleged informant was truthful in denying involvement, then it could be that the peace officer supplied false information to the magistrate granting the warrant.

It is true an informant's identity may be disclosed when the defendant needs the informant to confirm police perjury, but some quantum of evidence of possible perjury must be shown before disclosure can be required. *Robertson*, 494 N.W.2d at 724. Pate's allegations the officer lied about the informant, based on Crayton's claim he was not the informant, fall short of the quantum of evidence suggesting police perjury.[7] *See id.* at 724–25 ("Mere allegations of deliberate falsehood or of reckless disregard for the truth are insufficient to mandate an evidentiary hearing; they must be accompanied by an offer of proof."). Because Pate did not meet his burden to show his interest in obtaining the informant's identity outweighed the State's interest in maintaining the confidentiality, the district court properly denied his motion to compel.

IV. Did Pate's Counsel Render Ineffective Assistance?

[7] Pate notes that after the magistrate signed the warrant, officers realized they listed the subject apartment as apartment 4 rather than apartment 3, and made the change to the warrant. The inaccuracy appears to have been an insubstantial oversight or typographical error. Claims of innocent or negligent mistakes are insufficient to mandate an evidentiary hearing. *See Robertson*, 494 N.W.2d at 718.

Pate alleges "[c]ounsel was ineffective for failing to assert the doctrine of collateral estoppel regarding the disclosure of the confidential informant as the federal court already mandated said disclosure." He also generally alleges any failure to preserve error stemmed from ineffective representation. Because Pate's other assignments of error were adequately preserved, we analyze only his collateral estoppel claim.

Ineffective assistance of counsel requires a defendant to prove (1) trial counsel failed to perform an essential duty and (2) such failure resulted in prejudice. *State v. Philo*, 697 N.W.2d 481, 485 (Iowa 2005). To prove prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Martin*, 704 N.W.2d 665, 669 (Iowa 2005) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). A reasonable probability is sufficient to undermine confidence in the outcome. *Id.* Although we often preserve ineffective assistance claims for postconviction relief, we find the record here is sufficient to address Pate's claim on direct appeal. *See State v. Braggs*, 784 N.W.2d 31, 34 (Iowa 2010).

The doctrine of collateral estoppel provides that when a valid and final judgment determines an issue of ultimate fact, that issue may not be relitigated between the same parties in a future lawsuit. *State v. Butler*, 505 N.W.2d 806, 808 (Iowa 1993). The defendant bears the burden to prove the doctrine applies. *State v. Seager*, 571 N.W.2d 204, 208 (Iowa 1997).

The federal court's February 2009 discovery order requiring the government to submit certain documents to the court for an in camera review does not stand as a final determination of the ultimate fact as to disclosure of the informant's identity or on suppression matters. In addition, the order is not controlling on the same issue in state court. *Cf. State v. Shafranek*, 576 N.W.2d 115, 117 (Iowa 1998) (discussing dual sovereignty doctrine). Pate's counsel had no duty to advance a meritless argument. *See State v. Miller*, 622 N.W.2d 782, 787 (Iowa 2000).

AFFIRMED.