IN THE COURT OF APPEALS OF IOWA

No. 2-669 / 11-1658
Filed September 6, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RYAN KEITH BOCHERT,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Casey Jones (motion to dismiss) and Angie Wilson (trial), District Associate Judges.

Ryan Bochert appeals from the district court ruling denying his motion to dismiss on speedy indictment grounds. **REVERSED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Adam P. Humes, Assistant Attorney General, Jerry Vander Sanden, County Attorney, and Lisa Epp, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Bower, JJ.

POTTERFIELD, J.

Ryan Bochert appeals from his conviction and sentence for possession of marijuana and possession of drug paraphernalia following a trial on the minutes of testimony. He contends the district court erred in its rulings denying his motion to dismiss on speedy indictment grounds. The court found the motion was untimely, and that he was not arrested for speedy indictment purposes when police officers handcuffed him and held him at a residence while they executed a search warrant. Bochert alternatively claims on appeal that he was provided with ineffective assistance of counsel when counsel failed to file the motion to dismiss timely. We reverse, finding that while the motion to dismiss under the speedy indictment rule was untimely, counsel's failure to timely file constituted ineffective assistance of counsel.

I. Facts and Proceedings

August 4, 2010, Marion police officers obtained a search warrant for stolen items at the residence of Ryan Bochert. As they were approaching the home, the officers encountered Bochert outside the house and handcuffed him. Bochert consented to a pat-down search, and the officers found marijuana in a pants pocket.[1] The officers brought Bochert into the house, still handcuffed. After a walk-through, an officer brought Bochert to the front porch of the house for questioning. The officer gave Bochert his Miranda warnings, and kept him handcuffed. At least one other person in the house was also handcuffed for the

[1] After discovering the marijuana, the officers obtained a second search warrant for drug-related items.

entire time that the police performed the search. Bochert remained handcuffed in his home for approximately three hours.[2]

The officers informed those present they would be charged after the evidence seized was "sorted out". The officers did not inform Bochert he was under arrest. He was not free to leave. He was not free to walk around.

A complaint was filed September 23, 2010. Trial information was filed October 25, 2010. Written arraignment was filed November 10, 2010. A motion to dismiss on speedy indictment grounds was filed May 24, 2011. The court denied the motion, first finding it was not timely filed. The court then heard evidence on the merits and denied the motion again on the ground Bochert was not arrested on August 4, 2010, and the time period for filing the trial information did not begin to run on that date. Trial on the minutes was held June 27, 2011, when the court found Bochert guilty of possession of marijuana and possession of drug paraphernalia. He now appeals, contending the court erred in denying his motion to dismiss on speedy indictment grounds.

II. Preservation of Error

Iowa Rule of Criminal Procedure 2.11(4), which governs the timing of the filing of motions and pleadings, provides: "Motions hereunder, except motions in limine, shall be filed when the grounds therefor reasonably appear but no later than 40 days after arraignment." Failure to timely raise such a motion will

[2] We note that while Bochert contends on appeal that he was handcuffed for four hours, and the documentary evidence suggests the officers were at the home for over four hours, the district court found he was handcuffed for three. Because this finding is supported by substantial evidence (the testimony of two officers), it is binding on appeal. *State v. Lyrek*, 385 N.W.2d 248, 250 (Iowa 1986).

constitute waiver thereof unless good cause is shown for delay in filing. Iowa R. Crim. P. 2.11(3) (2010); *State v. Raines*, 574 N.W.2d 904, 909 (Iowa 1998).

We review the district court's determination for whether good cause exists for abuse of discretion. *Raines*, 574 N.W.2d at 909. We find no abuse of discretion in the district court's determination that the public defender's workload does not constitute good cause for delay and that no other good cause for delay existed here. The challenge is therefore not preserved for appeal.

III. Ineffective Assistance of Counsel

In the alternative, Bochert asserts he was provided with ineffective assistance of counsel as his attorney failed to raise the challenge in a timely manner. We review claims of ineffective assistance of counsel de novo. *State v. Utter*, 803 N.W.2d 647, 651 (Iowa 2011).

In order to prove his counsel was ineffective, the appellant must show both that (1) counsel failed to perform an essential duty and (2) prejudice resulted from that failure. *See State v. Simmons*, 714 N.W.2d 264, 276 (Iowa 2006). To show prejudice under the second prong, appellant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Utter*, 803 N.W.2d at 654. A reasonable probability is one "sufficient to undermine confidence in the outcome." *Id.* While we do not normally address claims of ineffective assistance on appeal, we will do so where the record is sufficient. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003).

Our supreme court recently addressed whether failure to move to dismiss for violation of the speedy indictment rule constituted ineffective assistance of

counsel. *Utter*, 803 N.W.2d at 652–55. There, the court found that where a speedy indictment violation is a claim with merit, counsel must pursue it or be found to have breached an essential duty. *Id.* at 652. Here, Bochert was arrested (as we will explain further in the second prong) August 4, 2010, and trial information was not filed until October 25, 2010, violating the forty-five day speedy indictment window. *See* Iowa R. Crim P. 2.5 (5) (stating the term indictment embraces trial information); *Ennenga v*. *State*, 812 N.W.2d 696, 705 (Iowa 2012) (holding indictment is found when trial information is approved and filed).

> Thus, to provide reasonably competent representation when a criminal defendant asserts his or her speedy trial rights, counsel must ensure that the State abides by the time restrictions established in Iowa Rule of Criminal Procedure 2.33. Counsel's failure to do so amounts to a failure to perform an essential duty.

Utter, 803 N.W.2d at 653. Here, counsel provided no explanation other than a heavy workload for the failure to timely file the motion to dismiss. This is not strategic decision-making, which is typically exempted from an ineffective assistance claim; rather, the failure to timely file constituted inattention to the responsibilities of an attorney. *Ledezma v*. *State*, 626 N.W.2d 134, 142 (Iowa 2001).

We also find a reasonable probability that, but for counsel's unprofessional errors, the outcome of this case would have been different. Once again, the record is sufficient for our review. The trial court heard testimony and found no arrest occurred, which is a prerequisite to the tolling of the speedy indictment period. *See* Iowa R. Crim. P. 2.33(2)(a). We disagree.

Our rules of criminal procedure require an indictment or trial information to be filed within forty-five days of arrest. Iowa R. Crim. P. 2.33(2)(a). Arrest is defined as "the taking of a person into custody when and in the manner authorized by law, including restraint of the person or the person's submission to custody." Iowa Code § 804.5 (2009). While the Code provides for specific formalities in arrest, our supreme court has found these formalities need not be met for an arrest to be effectuated. Iowa Code § 804.14; *State v*. *Wing*, 791 N.W.2d 243, 248 (Iowa 2010). Instead the test is "whether a reasonable person in the defendant's position would have believed an arrest occurred, including whether the arresting officer manifested a purpose to arrest." *Wing*, 791 N.W.2d at 248. There is no bright-line test to determine whether an arrest has been made. *Id.*

In *Wing*, our supreme court noted the defendant was not arrested at the time when he was initially stopped, patted down, and allowed to remain free outside the vehicle when it was searched. *Id*. at 252. Instead, the defendant was arrested when he admitted ownership of contraband found in the vehicle, was handcuffed, Mirandized, searched again, and placed in the back of a patrol car. *Id*. The court noted that he could not become "unarrested" when the police transported him to his house and the handcuffs were removed as the police searched his home. *Id*.

Bochert's situation is similar in several key ways. He was stopped by police upon exiting his home, was searched and drugs were removed from his pockets. He was Mirandized, handcuffed, and brought back into the house to sit for three hours as police searched his home. He was not allowed to move, he

was not free to leave. As police searched his house, they asked questions regarding Bochert's ownership of drugs and contraband. After they finished searching the premises, the officers instructed the house members they would be pressing charges; however, they needed to "sort through" the evidence first. The officers did not tell Bochert he was under arrest, and did not tell him he was not under arrest. Bochert and his family members continually called the station to inquire as to the status of the charges.

Bochert's case goes to the heart of the purpose of our speedy indictment rule, which is to "'relieve an accused of the anxiety associated with a suspended prosecution and provide reasonably prompt administration of justice.'" *Id.* at 246 (quoting *State v*. *Delockroy*, 559 N.W.2d 43, 46 (Iowa Ct. App. 1996)). Because we find a reasonable person in Bochert's position would have thought the officers had conducted an arrest on August 4th, the speedy indictment rule was violated by the State's failure to file a trial information against him within forty-five days. Prejudice therefore resulted from counsel's failure to timely file a motion to dismiss the indictment. As such, we find Bochert was provided with ineffective assistance of counsel. We therefore reverse and remand for dismissal of the trial information. *See Utter*, 803 N.W.2d at 655.

REVERSED.