IN THE COURT OF APPEALS OF IOWA

No. 2-837 / 11-1991
Filed October 31, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOHNNY LEWIS ARTHUR ANDERSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer, Judge.

Johnny Anderson appeals from convictions of sexual abuse, contending trial counsel was ineffective. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, David A. Adams, Assistant Appellate Defender, and Matthew Shimanovsky, Student Legal Intern, for appellant.

Thomas J. Miller, Attorney General, Elizabeth S. Reynoldson, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Linda Fangman, Assistant County Attorney, for appellee.

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

POTTERFIELD, P.J.

On appeal from his convictions for sexual abuse in the second degree and sexual abuse in the third degree, Johnny Anderson alleges he received ineffective assistance of trial counsel because there was no motion to dismiss the charges based on a violation of his rights to a speedy trial and substantive due process. Anderson waived his ninety-day and one-year speedy trial rights, did not reassert them, and requested many of the continuances ordered by the court. The district court on several occasions attempted to bring this case to trial. We will not on this record find counsel ineffective. We therefore affirm the defendant's convictions.

I. Background Facts and Proceedings.

A trial information was filed on March 3, 2006, charging then eighteen-year-old Johnny Anderson with one count of sex abuse in the second degree and one count of sex abuse in the third degree. The offenses allegedly occurred several years prior—sometime between January 1, 2000, and December 31, 2004. Anderson was born on May 23, 1987, and the two complaining witnesses (S.V., born in 1994, and L.V., born in 1990) were Anderson's cousins. The complainants did not disclose the abuse until 2005. Anderson was between the ages of twelve and fourteen when the incidents with S.V. (seven years younger than defendant) allegedly occurred. L.V. was thirteen or fourteen at the time of her contact with Anderson.

Anderson unsuccessfully moved to transfer jurisdiction to the juvenile court. On May 5, 2006, Anderson, then represented by an assistant public defender, Andrea Dryer, waived his ninety-day speedy trial rights. In an order

filed July 3, 2006, the district court granted the defendant's motion to continue with this notation on the order: "LAST CONT TO BE GRANTED."

A privately-retained attorney, Laura Langenwalter, appeared for Anderson on August 1, 2006, and several continuances were granted: some to allow defense counsel to prepare for trial, and others because defendant was in custody on unrelated charges and transportation had to be arranged.

A hearing was held, and Anderson waived his one-year speedy trial rights on January 12, 2007.

On February 8, 2007, Anderson's counsel moved to withdraw as she had accepted a position with the public defender's office. Trial was continued to allow Anderson to obtain new counsel and prepare for trial with new counsel.

Clovis Bowles appeared on behalf of Anderson on March 22, 2007, and later requested continuances to prepare for trial and for medical reasons. Bowles asked to be court-appointed on May 10 citing Anderson was then incarcerated and his family's financial resources had been exhausted. Bowles sought another continuance for medical reasons on May 21. At a June 16 pretrial conference, Anderson sought a continuance because "negotiations" were ongoing. On July 13, the defendant sought a continuance because "defense counsel not prepared." The July 13 pretrial conference order continuing trial until October 2, 2007, has this notation: "No more continuances."

On September 28, 2007, Anderson again sought a continuance because his expert witness needed additional time to prepare for trial. The hearing on that motion (which was to be the pretrial hearing) noted, Anderson was in custody; the State had presented a plea agreement offer, which Anderson rejected; and

the State would also need additional time to prepare in light of the newly announced expert witness.

Trial was to be held on December 4, but "was unable to be reached." It was rescheduled for December 18, 2007. However, on December 17, Anderson sought a continuance asserting defense counsel was involved in another trial. The trial was rescheduled for January 22, 2008. The defendant sought another continuance on January 18, and the trial was rescheduled for February 12. The February 8 final pretrial conference order noted that Anderson was to be transported "back from prison by 2/11/08."

On February 11, at a reported hearing, the defendant asked for another continuance of two weeks, which was granted. On February 22, the defendant asked for a continuance of thirty days as "apparently a defense witness will not be available at the time presently set for trial."

Trial was rescheduled for March, and pretrial conference was set for March 21, 2008. Anderson was then in a Fort Dodge facility. Anderson appeared before the court on March 21 and asked for a sixty-day continuance to locate a witness "important for the defense." The State expressed hesitation as to the sixty-day continuance. The court set trial for May 6 noting "this case is just now over two years old from when it was filed . . . . I would strongly recommend that you do everything possible so this case can proceed and be completed."

On April 15, 2008, Anderson moved for a continuance stating counsel would be out of state at the time of the scheduled pretrial conference and the defendant was scheduled to appear before the parole board on May 9. The State's resistance to the motion to continue states: "1. This case has been

continued numerous times by the Defendant. 2. At the last continuance the Court indicated there would be no more continuances." In an order dated May 2, 2008, the court granted the defendant "the opportunity to again attempt to locate the witness. However, the defense is advised that this matter will go to trial the next time it is scheduled, whether the witness has been located or not." Trial was reset for May 27.

The State then filed a motion to continue on May 13, citing the prosecutor's need to appear at a deposition with a medical examiner in a murder trial. Trial was rescheduled for July 1, 2008.

On June 27, 2008, Attorney Bowles moved to withdraw stating there had been a "complete breakdown of the attorney-client relationship." What followed this motion included a disagreement as to which of two attorneys now represented the defendant, and a dispute as to who was entitled to a box of materials containing trial preparation and work product. On July 14, the court ordered the box delivered to the defendant, allowed Bowles to withdraw, and ordered Anderson to "be prepared to identify counsel he has retained to represent him" by the July 25 pretrial conference.

Anderson appeared pro se on July 25, but told the court he "may retain Robert Montgomery." The court rescheduled the pretrial conference for August 8 and informed the defendant if he did not have counsel with him, a public defender would be appointed.

On August 8, Anderson appeared pro se. The court appointed Melissa Anderson-Seeber of the Juvenile Public Defender's office to represent him. The defense was granted continuances in August, September, November, and

December 2008, and January, March, April, and July 2009, for discovery and trial preparation purposes.

On July 29, 2009, Attorney Anderson-Seeber moved to withdraw as there "exists a conflict of interest in this case."

On August 6, 2009, Tammy Banning filed an appearance for the defendant and moved for a continuance to prepare for trial. Trial was rescheduled for October 6. But, on September 25, Anderson moved for another continuance "for the reason that defense counsel needs more time to prepare due to the extensive discovery that has occurred in this matter" and "has two other cases pending trial on that date with speedy trial demands." On November 2, the defense moved for additional time citing "discovery incomplete and potential witnesses need to be located." Trial was reset for December. An application to appoint an investigator at State expense was filed, and trial was moved to January 26, 2010.

For reasons unclear in this record, trial was reset for a March trial date after a January 25 hearing. On March 11, 2010, the defense asked for a continuance because "other charges [are] pending." The April trial date was continued at defendant's request as he was in custody on other charges in another county. The June trial date was continued at defendant's request for "further discussions." Trial was rescheduled for July 27, 2010.

On June 17, 2010, Attorney Banning moved to withdraw due to the "substantial breakdown in the attorney/client relationship" and the "serious nature of the felony offenses [in another case] of which the defendant is accused." The court denied the motion, set trial for the other pending case on July 23, and trial

in this case for August 17. In order to prepare for the other trial, defense counsel sought and was granted a continuance in this case.

Attorney Banning again moved to withdraw on August 18 noting Anderson had "lost confidence" in her and had filed an ethics complaint against her. At the subsequent hearing on the motion, the defendant confirmed he had attempted to file an ethical complaint against Banning. The State resisted the motion to withdraw noting "the continuing manipulation" by the defendant. The court nonetheless granted the attorney's motion to withdraw and appointed separate counsel in each of the defendant's two pending criminal cases.

Kevin Schoeberl was appointed to represent Anderson in this case. He filed an appearance on September 2, 2010, and was granted a continuance in October to prepare. Trial was scheduled for November 30, but was continued to December 14 for a reason that does not appear in this record. The defense sought another continuance on December 13 to prepare for trial, and on January 26, 2011, to locate witnesses. A hearing was held on this latter motion and in the January 26 order granting the motion the court noted:

> Counsel did not want to argue about the length of the continuance, since this case is so old. The Court will grant the continuance of the case for approximately thirty (30) days with the understanding that no additional continuances will be granted.

But, on February 14, the State moved to continue because counsel was not available for the February 22 trial date. Trial was reset for March 22.

Counsel was unavailable on the scheduled trial dates—this time it was defendant's counsel who moved to continue on grounds of unavailability on March 21, April 15, May 13, June 2, and June 30, 2011. On July 8, a pretrial

conference order notes the defendant moved to continue the trial because a witness was not available. Yet again, the court stated there would be "NO FURTHER CONTINUANCES." Trial was set for August 16, 2011.

During the time between the filing of the trial information in March 2006 and the trial in August 2011, Anderson had at least six different attorneys[1] and his trial was continued approximately fifty-nine times.

Following a bench trial, Anderson was found guilty and he now appeals.

II. Scope of Review.

We review constitutional claims de novo. *Ennenga v. State*, 812 N.W.2d 696, 700 (Iowa 2012).

III. Discussion.

A. Effective assistance of counsel—speedy trial. Anderson argues his trial counsel—one or more—were ineffective in failing to move to dismiss the charges based on a violation of his speedy trial and substantive due process rights. Anderson concedes his succession of attorneys contributed to the vast majority of the continuances that were granted in this case, but he maintains that after his case had been pending for two years he could not "be held solely responsible for the ridiculously high number of delays." Anderson asserts the primary reason for the delay in his trial was that "no one sought to give this case priority in scheduling," and he contends his waiver of a speedy trial was treated "as a blank check in the scheduling of this trial." He argues his trial counsel had a duty to file a motion to dismiss based on the denial of his right to a speedy trial and that if

[1] One attorney attended a hearing, but Anderson denied that the attorney represented him.

such a motion been filed there is a "reasonable probability that the charges would have been dismissed in its third, fourth, or fifth year."

The State responds that the defendant's attorneys were not ineffective for failing to file a meritless motion to dismiss.[2] It contends the defendant waived his right to a speedy trial and that all but three of the continuances (which totaled about 120 days) were attributable to the defendant.

> The right to assistance of counsel under the Sixth Amendment to the United States Constitution and article I, section 10 of the Iowa Constitution is the right to "effective" assistance of counsel. To establish a claim of ineffective assistance of counsel, the defendant must prove by a preponderance of the evidence: (1) that trial counsel failed to perform an essential duty, and (2) that prejudice resulted from this failure. The claim fails if the defendant is unable to prove either element of this test.

State v. Fountain, 786 N.W.2d 260, 265-66 (Iowa 2010) (citations omitted).

Iowa Rule of Criminal Procedure 2.33(2)(c) provides: "All criminal cases must be brought to trial within one year after the defendant's initial arraignment pursuant to rule 2.8 unless an extension is granted by the court, upon a showing of good cause." In *State v. Miller*, 311 N.W.2d 81, 83-84 (Iowa 1981), the Iowa Supreme Court wrote:

> In [*State v. Magnuson*, 308 N.W.2d 83, 85 (Iowa 1981)], we held that even though waiver is not mentioned in rule [2.33(2)(c)], "a defendant may waive the requirement of trial within one year of arraignment. Because the right to a speedy trial is personal, it is one which a defendant may forego at his election." If a defendant is not brought to trial within one year after arraignment because of delay attributable to the defendant or because the defendant consented to the delay, the issue of waiver may be raised even though the one-year period has expired. When a defendant has "waived his right under . . . rule [2.33(2)(c)], he cannot complain of the State's failure to obtain an extension of the period for trial."

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[2] The State also asserted at oral argument that the proper recourse would be for the defendant to reassert his speedy trial rights.

> Similarly, when a defendant is not brought to trial within the one-year period of rule [2.33(2)(c)] because of delay chargeable or consented to by the defendant, the prosecution should not be prohibited from obtaining an extension by showing good cause for the delay. It would be contrary to the public interest underlying the speedy trial time limitations of rule [2.33(2)], as expressed in the first sentence thereof, to dismiss criminal charges because of delay occasioned by the defendant. The time proscription of rule [2.33(2)(c)] is principally for the benefit of the defendant.

The United States Supreme Court has recently considered the speedy-trial implications of a three-year trial delay in *Vermont v. Brillon*, 129 S. Ct. 1283 (2009). The court explained:

> The Sixth Amendment guarantees that "in all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial." The speedy-trial right is amorphous, slippery, and necessarily relative. It is consistent with delays and dependent upon circumstances. In *Barker* [*v. Wingo*, 407 U.S. 514 (1972)], the Court refused to quantify the right into a specified number of days or months or to hinge the right on a defendant's explicit request for a speedy trial. Rejecting such inflexible approaches, *Barker* established a balancing test, in which the conduct of both the prosecution and the defendant are weighed. Some of the factors that courts should weigh include length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.
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> . . . *Barker* instructs that different weights should be assigned to different reasons and in applying *Barker*, we have asked whether the government or the criminal defendant is more to blame for the delay. Deliberate delay to hamper the defense weighs heavily against the prosecution. More neutral reasons such as negligence or overcrowded courts weigh less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.
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> In contrast, delay caused by the defense weighs against the defendant: If delay is attributable to the defendant, then his waiver may be given effect under standard waiver doctrine. That rule accords with the reality that defendants may have incentives to employ delay as a defense tactic: delay may work to the accused's advantage because witnesses may become unavailable or their memories may fade over time.

> Because the attorney is the defendant's agent when acting, or failing to act, in furtherance of the litigation, delay caused by the defendant's counsel is also charged against the defendant.

Brillon, 129 S. Ct. at 1290-91 (internal quotation marks, alterations, and citations omitted). In *Brillon*, the Supreme Court explicitly rejected the notion that delays caused by the failure of several assigned counsel to move the defendant's case forward was chargeable to the State. *See id.* at 1291-92.

Here, Anderson waived his speedy trial rights, and he does not contend his waiver was involuntary. He was represented by a series of counsel, each of whom required time to prepare for his defense. The continuances granted at his behest are chargeable to him. Only about four months of the five years of delay can be attributable to the State.

> The obvious purpose of the time periods contained in rule [2.33] is to implement the constitutional provisions that require a speedy trial. These rules were not intended to provide a defendant with a weapon to trap state officials and terminate prosecutions. Nor were they intended to be a device to give a defendant absolute immunity from prosecution. *See State v. Zaehringer*, 306 N.W.2d 792, 796 (Iowa 1981). [A defendant] may not actively, or passively, participate in the events which delay his trial and then later take advantage of that delay to terminate the prosecution.

State v. Finn, 469 N.W.2d 692, 694 (Iowa 1991).

Anderson also states that a "district court, which is in charge of its own calendar, cannot passively participate in events that delay the trial fifty-nine times over a five year period." On our de novo review of this record, we reject the defendant's implication that the district court "passively" allowed the numerous continuances. We set out above the numerous instances the district court attempted to move this case to completion. On each occasion, the defendant's counsel withdrew and a new attorney required additional time to prepare for trial.

See Ledezma v. State, 626 N.W.2d 134, 143 (Iowa 2001) (noting that counsel must conduct a reasonable investigation under the circumstances of the case).

On this record, we are unable to say that the time taken by each attorney constituted unreasonable investigation or preparation for trial. *See id.* at 142 (noting we presume counsel performed competently and avoid second-guessing; the defendant "must demonstrate the attorney performed below the standard demanded of a reasonably competent attorney"). The defendant has failed to meet his burden to establish counsel's performances were below the standard demanded of a reasonably competent attorney.

B. Effective assistance of counsel—due process. "Substantive due process prevents the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty." *Atwood v. Vilsack*, 725 N.W.2d 641, 647 (Iowa 2006) (internal quotation marks and citations omitted).

Anderson argues (again unidentified) counsel was (or were) ineffective in failing to move to dismiss for violation of his right to substantive due process. He contends the unique circumstances of this case combined to create a level of delay that deprived him of his right to be charged and tried within a reasonable period of time. He first contends that the extended statute of limitations that applies in this case, Iowa Code § 802.2,[3] allowed the State to base its charges,

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[3] The 2005 Iowa Code was in effect at the time the complaining witnesses disclosed the abuse. Section 802.2(1) provides:

> An information or indictment for sexual abuse in the first, second, or third degree committed on or with a person who is under the age of eighteen years shall be found within ten years after the person upon whom the offense is committed attains eighteen years of age . . . ., or if the identity of the person against whom the information or indictment is

in part, upon incidents that occurred more than five years before the filing of the trial information. Anderson notes that this statutorily permissible delay rendered him too old for juvenile court intervention by the time the victims' allegations were finally reported and charges were filed. He next points to the delay that occurred after he was charged, but was not tried for another five years. He argues a ten-year gap between an offense and the trial thereon violates a defendant's right to a trial within a reasonable period of time and constitutes a denial of fundamental fairness that shocks the conscience.

We note that Anderson does not challenge the constitutionality of Iowa Code section 802.2. Under that provision, where the alleged victim is under the age of eighteen, a sexual abuse prosecution must be brought within ten years of the victim attaining adulthood. Thus, a ten-year delay in prosecution would fall within a time period considered to be acceptable by our legislature.

While we do not condone the length of time this case was pending, viewing the totality of circumstances, including that defense witnesses were asserted to be out of state and difficult to locate, we do not find a due process violation such that counsel were ineffective in failing to move to dismiss. *See Brillon*, 129 S. Ct. at 1290 (noting defendants may have incentives to employ

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sought is established through the use of a DNA profile, an information or indictment shall be found within three years from the date the identity of the person is identified by the person's DNA profile, whichever is later.

delay as a “defense tactic”: delay may “work to the accused’s advantage” because “witnesses may become unavailable or their memories may fade” over time).

AFFIRMED.