IN THE COURT OF APPEALS OF IOWA

No. 7-606 / 06-1829
Filed November 15, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DANNY DEAN HERRMANN,
Defendant-Appellant.

Appeal from the Iowa District Court for Wapello County, Kirk A. Daily, Judge.

Danny Herrmann appeals the court's failure to dismiss his case when trial did not occur within one year of the arraignment. **REVERSED AND REMANDED.**

Richard J. Hanson, of Heslinga, Heslinga, Dixon, Moore & Hanson, Oskaloosa, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Mark Tremmel, County Attorney, and Ron Kelly, Assistant County Attorney, for appellee.

Heard by Zimmer, P.J., and Eisenhauer and Baker, JJ.

EISENHAUER, J.

Danny Herrmann (Herrmann) was not tried within Iowa's one-year time limit between arraignment and trial; he did not waive his right to a speedy trial; and good cause for the delay has not been shown by the State. We return the case to the district court for dismissal of the trial information.

I. BACKGROUND FACTS AND PROCEEDINGS.

Related events in November 2004 resulted in criminal prosecutions in Davis County and Wapello County. This appeal is from the Wapello County proceedings. Because the background facts are irrelevant to the dispositive appeal issue, we set out only the relevant procedural history.

On January 31, 2005, the State charged Herrmann in Wapello County with extortion and harassment while aiding and abetting his brother. On February 18, 2005, Herrmann filed a written arraignment specifically reserving his right to trial within one year of his initial arraignment.

In April 2005, Herrmann was examined by a psychiatrist who determined he was not competent to go to trial. Herrmann next filed a motion for a hearing to determine competency in Wappello County. On May 9, 2005, the court ordered the proceedings suspended and granted the State's request for a psychiatric examination. On August 4, 2005, the court evaluated the conflicting psychiatric opinions and ruled Herrmann competent to stand trial, lifting the suspension. The State and Herrmann agree the eighty-seven days of the Wapello County court's first suspension extend the speedy trial deadline. The State did not request a trial date after the court's ruling of competency.

Herrmann had additional psychiatric tests and another evaluation completed in November 2005.

At some point, a competency hearing was set for January 26, 2006, in the Davis County proceedings. In December 2005, Herrmann's attorney indicated to the Wapello County attorney he would be requesting a second competency hearing in the Wapello case after the January Davis County competency hearing. The prosecutor agreed to set trial for a February date.

On December 21, 2005, the prosecutor filed a motion requesting trial be set for February 6, 2006, which the court granted. We note February 6 is within the original speedy trial deadline which started on February 18, 2005, even without adding in the eighty-seven day extension.

On January 27, 2006, the Davis County court ruled Herrmann not competent to stand trial and dismissed the charges. Herrmann then moved for a second competency hearing in Wapello County based on the Davis County proceedings. The Wapello County court, on February 2, 2006, suspended the proceedings and, on April 26, 2006, again found Herrmann competent to stand trial, lifting the suspension. The State and Herrmann agree the eighty-three days of the court's second suspension extend the speedy trial deadline. *See* Iowa Code § 812.4 (Iowa 2003).

A pretrial conference was held on June 14, 2006, and trial was set for August 14, 2006. On August 21, 2006, the court granted the State's request that trial be set for August 28, 2006. There is no indication in the record why trial did not occur on August 14.

On August 24, 2006, Herrmann filed a motion to dismiss based on the State's violation of the one-year speedy trial rule. Herrmann argued there were 556 days between the arraignment and the August 28, 2006, trial date. Recognizing and deducting the time periods for the court-ordered suspensions resulted in 386 days between arraignment and trial.

The State filed a resistance to the motion on the day of trial and the court denied Herrmann's motion. The case proceeded to trial and Herrmann was convicted. Herrmann appeals the court's speedy trial ruling, among other issues. Because we find the speedy trial issue dispositive, we do not address the other issues raised on appeal.

II. SCOPE AND STANDARDS OF REVIEW.

In deciding indictment and speedy trial questions, our scope of review is for correction of errors at law. *See State v. Miller*, 637 N.W.2d 201, 204 (Iowa 2001). Because a district court has discretion to avoid dismissal under Iowa's speedy trial rule, we ultimately look to whether the district court abused its discretion. *Id.* "When speedy trial grounds are at issue, however, the discretion given to the district court narrows." *State v. Winters*, 690 N.W.2d 903, 907-08 (Iowa 2005). "The discretion to avoid dismissal in a criminal case is limited to the exceptional circumstances where the State carries its burden of showing good cause for the delay." *State v. Bond*, 340 N.W.2d 276, 279 (Iowa 1983).

III. MERITS.

A. Speedy Trial Rule.

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 . .

. unless an extension is granted by the court, upon a showing of good cause." This rule establishes an "outer-limit" for trial, similar to a statute of limitations. *State v. Mary*, 401 N.W.2d 239, 241 (Iowa Ct. App. 1999). "Once the one-year period has expired the State must show either a waiver on the part of the defendant or good cause for the delay." *Id*. While waiver is not specifically mentioned in the rule, because the right to a speedy trial is personal, it is a right a defendant can waive. *State v. Rodriguez,* 511 N.W.2d 382, 383 (Iowa 1994); *State v. Magnuson*, 308 N.W.2d 83, 85 (Iowa 1981). Under our rule, good cause focuses on only one factor, the reason for the delay. *State v. Nelson*, 600 N.W.2d 598, 601 (Iowa 1999). The State's burden of demonstrating good cause is a heavy one. *Mary*, 401 N.W.2d at 241.

On the day of trial, the court denied Herrmann's motion to dismiss:

> In looking at the file in this case, understanding what happened in Davis County, the court notes that there have been two competency proceedings going on, here and in Davis County. Those have been intertwined to the extent that defendant wished to indicate – after the initial finding in Wapello County that he was competent, he indicated to the county attorney here that he would be seeking a second ruling here, after the ruling occurred in Davis County.
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> The court notes there have been various continuances as well as suspensions. The court further notes that this trial date was set at pretrial, or at least the August 14 date was set at pretrial with the consent of the defendant, which would have been outside the one year under the defendant's analysis of time. That would still be seven days over.
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> The court finds that you cannot – that a substantial portion of that 21 days is attributable to the defendant's requests in the case and motions for continuance as well as the intertwined nature of these cases, particularly the fact the defendant wished to have the trial date postponed to obtain the ruling in Davis County, and indicated an intent to seek further hearing here.
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> In light of that, the court finds there has been good cause for the 21 days going over, and the motion to dismiss is denied.

On appeal, Herrmann argues the court should have granted his motion to dismiss. Herrmann notes the last suspension was lifted on April 26, 2006, leaving 104 days to meet the deadline of August 7, 2006. Although the trial court's decision identifies Herrmann's continuances as one basis for denying dismissal, Herrmann argues he did not file any motion to continue after the second suspension ended and the only continuance in the record after the last suspension is the State's request for a trial on August 28, 2006. Because the record shows no reason for this additional delay, Herrmann argues there appears to be no reason other than oversight, which is not good cause.

Further, Herrmann denies waiving his right to a speedy trial and argues the fact the pretrial conference set a date violating the speedy-trial rule does not constitute waiver because there is no evidence Herrmann was present at the pretrial conference. Additionally, Hermann claims his attorney's not objecting to a trial date set outside the one year period is not waiver or consent because Iowa law does not make the defendant responsible for reminding the State of case deadlines.

The State's August 28, 2006 resistance to dismissal, filed on the day of trial, argued the time from November 4, 2005 to February 2, 2006, was attributable to Herrmann's competency motion in Davis County and should not count toward the one-year deadline. On appeal, the State has narrowed the days it claims are attributable to Herrmann showing good cause or waiver: forty-

three days from the State's December 21, 2005 motion to set a February trial date to the court's February 2, 2006 order starting the second suspension.[1]

B. Waiver.

"[W]aiver is the intentional relinquishment of a known right." *Huisman v. Miedema*, 644 N.W.2d 321, 324 (Iowa 2002). "It is largely a matter of intent which may be ascertained from a person's conduct." *Babb's Inc. v. Babb*, 169 N.W.2d 211, 213 (Iowa 1969).

In attempting to meet its heavy burden of proving waiver, the State relies on *State v. Versluis*, No. 5-0065 (Iowa Ct. App. Oct. 26, 2005) where dismissal was found inappropriate because the defendant "agreed to or jointly requested the continuances that delayed trial past the one-year mark." *Id*. We find *Versluis* unpersuasive because Herrmann's December request for a February trial date did not delay trial past the one-year mark. In fact, Herrmann's request resulted in a trial date set within both the original speedy-trial deadline and the new deadline created when the court lifted its first suspension. Once the first suspension was lifted, both parties were put on notice of an eighty-seven day extension to the original deadline. We do not believe Herrmann waives such an important right as

[1] On May 1, 2006, Herrmann filed a motion requesting the court enlarge/amend its April 26, 2006 competency ruling. The court affirmed its earlier decision on May 25, 2006. There was no court-ordered suspension during this process. For the first time on appeal, the State argues the twenty-four days from Herrmann's motion to enlarge/amend until the court's denial should be excluded. However, the issue of the effect of Herrmann's motion to enlarge/amend on the speedy trial deadline was not presented to and passed upon by the district court and, therefore, will not be decided on appeal. *State v. Jefferson*, 574 N.W.2d 268, 278 (Iowa 1997). We note the court did not suspend proceedings as it had done in the recent past and also note routine motions generally do not extend the deadline. *See State v. Winters*, 690 N.W.2d 903, 908 (Iowa 2005) ("[D]efendants do not waive their right to be tried within the speedy-trial deadline by filing timely pretrial motions.").

his speedy trial right by requesting trial at a future date *within* the speedy trial deadline.

Second, the State argues the court's order after pretrial conference[2] setting a trial date of August 14, beyond the one-year deadline, demonstrates wavier under *State v. Potts*, 240 N.W.2d 654, 656-57 (Iowa 1976). However, a critical component in *Potts* was the fact the defendant was present and with counsel when the *Potts* court set the trial date. *Id.* at 656. While our record gives no indication Herrmann was present with counsel at the pretrial conference, because no trial occurred on the trial date established by the pretrial order, that date is not the critical date subject to our examination on appeal. Rather, the critical trial date is August 28, 2006, and the critical process for examination to determine if waiver occurred is the process for establishing the August 28 trial date.

The record does not disclose why trial did not occur on August 14 and the State admits it is not clear why trial did not take place then or why the State sought to continue trial to August 28. The next document filed after the pretrial order is the August 21, 2006, trial setting order which states: "The State requests trial in this matter be set for August 28, 2006. . . . It is so ordered." There is no indication either Herrmann or his attorney was present when this order setting

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[2] From 1943 to 1973, Iowa courts repeatedly interpreted the various speedy trial provisions to provide the defendant "waives right to a dismissal for failure to demand a speedy trial." *State v. Gorham*, 206 N.W.2d 908, 909 (Iowa 1973). The *Gorham* court changed Iowa law and rejected the rule that absent a demand, a defendant waives his right to a speedy trial. "A defendant has no duty to bring himself to trial: the State has that duty." *Id*. at 911. Further, expecting a criminal defendant to insist on his own trial is inconsistent with human nature. *Id* at 912.

the trial date was entered, therefore, the State has failed to prove Herrmann waived his right to a speedy trial. *See Potts*, 240 N.W.2d at 656-57.

C. Good Cause.

The State argues the ongoing competency challenges show good cause for delay and the court properly considered the surrounding circumstances of no prejudice to Herrmann because (1) Herrmann did not express a concern about the delay resulting from the pretrial order trial date and (2) Herrmann was out on pretrial release and not in custody while awaiting trial.

The Iowa Supreme Court has made it clear good cause depends on only one factor – the reason for the delay. *Winters*, 690 N.W.2d at 908. "When the delay is said to result from other pending proceedings in the same or related cases, we require diligence from those seeking . . . to prove good cause [and] from those claiming denial of a speedy trial." *State v Lybarger*, 263 N.W.2d 545, 547 (Iowa 1978). Everyone agrees both competency suspensions operated to extend the speedy-trial deadline. However, we do not agree with the State's claim that Herrmann's act of requesting trial at a future date in February *within* the speedy trial deadline demonstrates a lack of diligence and is good cause for an additional deadline extension benefitting the State. In evaluating the State's diligence, we note the State took no action to bring Herrmann to trial between August 4, 2005, and its December 21, 2005, motion. Additionally, the State had 104 days to bring Herrmann to trial once the second suspension was lifted. Our analysis must strictly construe the speedy trial statute in favor of Herrmann and all doubts are to be resolved in his favor. *Winters*, 690 N.W.2d at 908. We are not persuaded Herrmann's request for a trial date within the speedy trial deadline

can be claimed by the State, after the fact, to be good cause for its failure to bring Herrmann to trial within the time remaining after the second suspension lifted.

In our analysis of the reason for the delay to determine if good cause exists, the State admits it is not clear why trial did not take place on August 14 or why the State sought to continue trial to August 28.[3] Since no reason is advanced by the State to explain this delay, it has failed its heavy burden of proving good cause. "If trials of the county attorney's prosecutions are set for dates beyond the required period and he simply lets the trial assignment stand, he assumes the risk that his prosecutions will be dismissed." *State v. Wright*, 234 N.W.2d 99, 104 (Iowa 1975). "The State, not the defendant, must see that prosecution is timely and that a trial is afforded within the allowable period." *Lybarger*, 263 N.W.2d at 546; *State v. Mary*, 401 N.W.2d at 242; *see also Wright*, 234 N.W.2d at 104 (defendant's failure to object or to ask for an earlier date is not good cause, the onus was not on him to do so, it is the State's burden to provide a speedy trial). The State's burden to establish good cause is not met where no reason at all is offered to explain the delay to an August 28 trial date.

When the reason for the delay is insufficient for the State to meet its heavy burden, other factors, including a short period of delay or the lack of prejudice to Herrmann, "will not avail to avoid dismissal." *See Miller*, 637 N.W.2d at 205; *Nelson* 600 N.W.2d at 601. Therefore, we need not consider the surrounding

[3] Even if the delay was due to court congestion on August 14, under Iowa law, court congestion will not allow the State to meet its burden of establishing good cause for a delay. *See Miller*, 637 N.W.2d at 206.

circumstances and decide whether Herrmann was prejudiced. *See State v. Peterson*, 288 N.W.2d 332, 335 (Iowa 1980).

Here, the reason for the delay is nonexistent and, therefore, as a matter of law, insufficient. No good cause has been shown by the State. The district court abused its discretion in denying Herrmann‘s motion to dismiss. We reverse the judgment on Herrmann‘s conviction and remand to the district court to dismiss the trial information.

REVERSED AND REMANDED.