IN THE COURT OF APPEALS OF IOWA

No. 9-377 / 08-0881
Filed July 2, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DENNIS WILLIAM BUSH,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Joseph Moothart (pretrial motions) and Nathan A. Callahan (trial and sentencing), District Associate Judges.

Defendant appeals from his conviction of operating while intoxicated, second offense, contending his right to speedy indictment was violated. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Thomas Gaul, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brett Schilling, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Miller, JJ.

SACKETT, C.J.

Defendant, Dennis Bush, appeals from his conviction of operating while intoxicated (OWI), second offense, in violation of Iowa Code section 321J.2 (2005).[1] He contends the charge should have been dismissed because the trial information charging him was filed more than forty-five days after his arrest. The district court denied his motion to dismiss on this ground and found him guilty after a trial on the minutes of testimony. We affirm.

I. BACKGROUND. On July 6, 2006, Waterloo officers stopped the defendant in response to a report of a suspicious person driving a red truck. The defendant appeared to be extremely jumpy and nervous and was sweating heavily. After officers discovered a crack pipe in the truck, they informed the defendant he was under arrest. Due to the defendant's behaviors and because the defendant told officers he did not have seizure medication he needed, the officers took him to the hospital. There, an officer invoked implied consent procedures and the defendant submitted a breath and urine sample. The breath sample yielded no results and the urine sample was sent for testing. The officer's incident report stated, "Possession of crack cocaine/3rd offense and operating while intoxicated/2nd offense charges are pending his discharge from

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[1] Iowa Code section 321J.2 provides in relevant part,

> 1. A person commits the offense of operating while intoxicated if the person operates a motor vehicle in this state in any of the following conditions:
>
> a. While under the influence of an alcoholic beverage or other drug or a combination of such substances.
>
> . . .
>
> c. While any amount of a controlled substance is present in the person, as measured in the person's blood or urine.

the hospital." The hospital did not notify the police when it discharged the defendant. The incident report was never submitted and charges were never filed against the defendant for possession of narcotics.[2]

The urine test results were returned on July 20, 2006, and showed the presence of cocaine and marijuana. On August 29, 2006, the defendant was located and arrested for OWI. The trial information officially charging the defendant was filed on October 6, 2006.

The defendant filed a motion to dismiss the charges contending his right to a speedy indictment was violated. He claimed he was actually arrested for the charge on the date of the incident, July 6, 2006, but the trial information was not filed until seventy days later, on October 6, 2006. Following a hearing on the motion on February 5, 2007, the district court overruled the motion, finding the defendant was arrested for possession of drug paraphernalia on the date of the initial stop, but was not arrested for OWI until the test results were returned and he was located on August 29, 2006. Since the trial information was filed within forty-five days of August 29, 2006, there was no violation of the speedy indictment rule.

On March 13, 2007, the State moved to reopen the record after it learned of a videotape of the initial traffic stop that could be relevant to the defendant's

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[2] The officer's report was made on the date of the incident, but was never submitted to the county attorney. The officer testified it was not submitted because he was placed on administrative leave for six months shortly after he made the report, and he forgot to submit it after he returned to his duties. The officer only realized he had not submitted the report after he was subpoenaed to testify at the hearing on the defendant's motion to dismiss.

motion to dismiss. After viewing the tape, the court determined it was of no consequence and affirmed its ruling, noting:

> [T]he officer does state "I have a feeling you're driving under the influence too, ain't ya." Even if the officer did tell the defendant that he was now under arrest, the context of the above-quoted statement and the other officer locating evidence in the vehicle is consistent with the previous finding that the defendant was placed under arrest for Possession of Drug Paraphernalia and not for Operating While Intoxicated. [The exhibit] does not establish that the defendant was arrested for Operating While Intoxicated on July 6, 200[6].

Following a trial on the minutes of testimony, the defendant was found guilty of operating while intoxicated, second offense. The defendant appeals, contending the court erred in overruling his motion to dismiss.

II. STANDARD OF REVIEW. When interpreting the speedy indictment rule, we review for the correction of errors at law. *State v. Rains*, 574 N.W.2d 904, 909 (Iowa 1998); *State v. Edwards*, 571 N.W.2d 497, 499 (Iowa Ct. App. 1997). We are bound by the court's fact findings if they are supported by substantial evidence and the defendant is only entitled to prevail if the evidence was so strong that he was entitled to dismissal as a matter of law. *State v. Finn*, 469 N.W.2d 692, 693 (Iowa 1991); *State v. Hart*, 703 N.W.2d 768, 771 (Iowa Ct. App. 2005).

III. ANALYSIS. Absent good cause or the defendant's waiver, if an indictment is not filed within forty-five days after an adult's arrest, the court must dismiss the charges. Iowa R. Crim. P. 2.33(2)(*a*). The term "indictment" as used in the rule includes a trial information. *Rains*, 574 N.W.2d at 910. In this appeal,

we must determine when the defendant was "arrested" for OWI to trigger the forty-five day speedy indictment rule.

The general law of arrest provided by Iowa Code chapter 804 governs the definition of "arrest" for purposes of rule 2.33(2)(*a*). *Id.*; *State v. Dennison*, 571 N.W.2d 492, 494 (Iowa 1997). An "[a]rrest is 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." Iowa Code § 804.5. An assertion of authority coupled with a purpose to arrest and followed by submission of the arrestee constitutes an arrest. *State v. Johnson-Hugi*, 484 N.W.2d 599, 601 (Iowa 1992).

The defendant argues he was arrested for the OWI charge when he was initially stopped on July 6, 2006. He contends he was not free to leave and officers suspected he was driving under the influence. He also points out that on the implied consent form the officer completed at the hospital, the officer checked a box stating the defendant "was placed under arrest for violation of Iowa Code Section 321J.2." He argues that the fact no charges were ever filed for possession of drugs or drug paraphernalia supports the inference that the police actually arrested him for OWI, particularly since the defendant was stopped while driving. The State agrees that the defendant was arrested on July 6, 2006, but was only arrested for possession of narcotics and/or paraphernalia, and he was only under investigation for the OWI offense. It claims the State would not want to arrest the defendant for operating while intoxicated until the urine test results were returned.

We find the court's findings are supported by substantial evidence and its interpretation of rule 2.33(2)(*a*) reflects no error of law. The videotape shows the defendant was initially taken into custody because officers found drug paraphernalia in the defendant's truck. An officer's failure to follow-up on an arrest by booking or filing charges on the offense does not nullify it as an arrest. *Dennison*, 571 N.W.2d at 495; *State v. Schmitt*, 290 N.W.2d 24, 26 (Iowa 1980). Thus, the fact that the defendant was never indicted for possession of cocaine or drug paraphernalia does not mean he was not arrested on that basis.

The evidence and law also support the court's finding that the defendant was not arrested for OWI on the date of the initial stop. At that point, the defendant was only under investigation for OWI, and was transported to the hospital for drug testing and out of concern for his health. "[T]he invocation of implied consent procedures does not require an arrest if the situation qualifies under one of the conditions set forth in Iowa Code section 321J.6(1)(b)-(f)." *Dennison*, 571 N.W.2d at 495. One condition is when, a preliminary breath test shows an alcohol level below the legal limit, but the officer has reasonable grounds to believe the person is under the influence of a controlled substance. Iowa Code § 321J.6(1)(f); *Dennison*, 571 N.W.2d at 495. Under this circumstance, an officer's request for a chemical test does not convert the defendant's custody into an arrest. *Id.* at 496. The defendant's detention on July 6, 2006, was due to these exact conditions. In marking the grounds for invoking implied consent on the form, the officer marked both that the defendant was under arrest for violation of 321J.2 and because there were grounds to believe

the defendant was under the influence of drugs. It is significant that the officers did not issue a citation or a complaint on the OWI charge on July 6, and only detained the defendant for testing. *See id.* at 497. The court's findings are supported by substantial evidence and we affirm.

AFFIRMED.