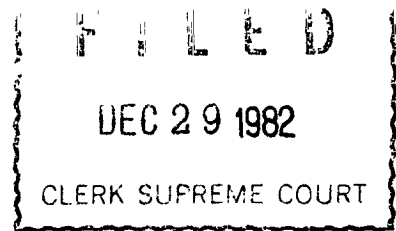


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed December 29, 1982

vs.

)

368

JOHN ANTHONY TROST,

)

2-364

65322

Defendant-Appellant.

)

Appeal from Webster District Court - Russell J. Hill, Judge.

Defendant appeals from his conviction of terrorism, a violation of Iowa Code § 708.6 (1981), and going armed with intent, a violation of Iowa Code § 708.8 (1981).

AFFIRMED.

Francis Hoyt, Jr., Chief Appellate Defender, and Douglas F. Staskal, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Michael Jordan, Assistant Attorney General, for plaintiff-appellee.

Considered en banc.

On appeal, defendant asserts that (1) his late filing of a notice of intent to present a "diminished capacity" defense, and the delays attendant upon the State's attempt to obtain an expert examination to meet the defense, do not constitute good cause for the delay in bringing him to trial; and (2) the trial court should have given defendant's proposed jury instruction that the court had "authority" to obtain involuntary hospitalization for the defendant if he should be found not guilty on a diminished responsibility theory. We affirm.

Whether good cause has been shown for failure to bring a defendant to trial within the ninety-day period set by rule 27(2)(b) of the Iowa Rules of Criminal Procedure is determined by focusing on "only one factor: the reason for the delay." State v. Peterson, 288 N.W.2d 332, 335 (Iowa 1980). When a trial date set within the ninety-day period is missed because of the absence of defense counsel, the effect of court congestion and prosecutor workload upon the resetting of trial may properly be considered. See State v. Moehlis, 250 N.W.2d 42, 46 (Iowa 1977) (that delay is caused partially by defendant is proper consideration in determining good cause). Because defendant's counsel was unable to be present on the original trial date—which was within ninety days of filing the information—we hold that the temporarily congested trial docket constituted good cause for setting a new trial date outside the ninety-day period, and therefore good cause for failure to bring defendant to trial within that period.

Defendant's contention that the trial court should have told the jury that defendant could be involuntarily hospitalized if found not guilty by reason of diminished capacity is without merit. See State v. Hamann, 285 N.W.2d 180, 186 (Iowa 1979) (request to allow similar instruction in insanity defense cases rejected).

AFFIRMED.