

IN THE COURT OF APPEALS OF IOWA

FILED

MAY 28 1985

CLERK SUPREME COURT

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STATE OF IOWA,

)

Plaintiff-Appellant,

)

Filed May 28, 1985

vs.

)

LYMAN FORD BEEBE, JR.,

)

5-155

84-952

Defendant-Appellee.

)

**Appeal from the Iowa District Court for Linn County - John F. Siebenmann,
District Associate Judge.**

**The State appeals from the dismissal on speedy trial grounds of a
prosecution for OWI in violation of Iowa Code section 321.281, asserting that the
evidence was sufficient to establish both good cause for delay and implied waiver
of the right to speedy trial. AFFIRMED.**

**Jerry A. VanderSanden, Assistant Linn County Attorney, for plaintiff-
appellant.**

**Mary K. Hoefer, Iowa City, and Thomas M. Wertz of Tom Riley Law Firm,
Cedar Rapids, for defendant-appellee.**

Heard by Snell, P.J., and Schlegel and Sackett, JJ.

PER CURIAM

Defendant was charged with OWI by information filed on November 10, 1983, and shortly thereafter filed a demand for speedy trial coupled with a suggestion for trial dates that would have been beyond the ninety-day period for trial required under Iowa R. Crim. P. 27(2)(b). Trial was, however, set for January 23, 1984, within the ninety-day period. On January 3, the last day allowed under applicable rules, defendant filed a motion to dismiss asserting lack of probable cause for the stop leading to his arrest. Hearing was held on January 11 and the motion was overruled on February 2. Neither defendant nor the State alerted the court to a potential speedy trial problem and trial was rescheduled for April 16, 1984. On March 6, defendant filed a motion to dismiss on speedy trial grounds. The court sustained the motion, finding that the State had shown neither good cause nor waiver of the right to speedy trial.

Iowa Rule of Criminal Procedure 27(2)(b) provides:

It is the public policy of the state of Iowa that criminal prosecutions be concluded at the earliest possible time consistent with a fair trial to both parties. Applications for dismissals under this subsection may be made by the prosecuting attorney or the defendant or by the court on its own motion.

* * *

b. If a defendant indicted for a public offense has not waived his or her right to a speedy trial he or she must be brought to trial within ninety days after indictment is found or the court must order the indictment to be dismissed unless good cause to the contrary be shown.

Under this statute, a case must be dismissed if trial is not commenced within ninety days unless one of the following has been shown: (1) the defendant has waived his right to speedy trial; (2) the delay is attributable to the defendant; or (3) there is good cause for the delay. State v. Peterson, 288 N.W.2d 332, 335 (Iowa 1980).

Our review of the trial court's order is not de novo. To secure reversal, the

defendant must show the trial court abused its discretion. State v. Donnell, 239 N.W.2d 575, 579 (Iowa 1976).

On appeal the State claims that the trial court erred in finding that the State failed to show good cause for the delay. The State argues that good cause for the delay was shown because the defendant did not file his first motion to dismiss until fifty-four days after the filing of the trial information, the last possible day in which to file such motions, and the defendant's trial date had to be reset to allow a time to schedule, hear, and rule on the first motion to dismiss.

Good cause focuses on one factor: the reason for the delay. Id. In examining the reason for the delay, we look at the surrounding circumstances including the length of the delay, whether the defendant asserted his right to speedy trial, and whether he was prejudiced by the delay. Id. In addition, delay attributable to the defendant may constitute good cause: The defendant must accept such passage of time as is reasonably necessary for action on his motions. State v. Moehlis, 250 N.W.2d 42, 46 (Iowa 1977).

In this case we do not believe the trial court abused its discretion by refusing to find good cause for the delay. Although the defendant filed a motion to dismiss fifty-four days after arraignment, we do not believe this to be a sufficient showing of delay attributable to the defendant to establish good cause. It is true that if the State can establish that the defendant, through the filing of motions, actively contributes to the delay, then a finding of good cause is warranted. State v. Truax, 232 N.W.2d 861, 863 (Iowa 1975). However, in this case there were still thirty-six days remaining in the ninety-day period at the time the motion was filed. The motion was one page and the hearing on the motion was short. The question of whether to grant the motion to dismiss was not a complicated one and yet the trial court did not issue a ruling for twenty-three days. We believe that this delay is not one which should be attributed to the

defendant. We do not believe the trial court abused its discretion in finding the State failed to establish good cause.

We also reject the State's argument that the defendant implicitly waived his right to speedy trial by acquiescing in the new trial date which was beyond the ninety-day period. Mere acquiescence in the setting of a trial date beyond the period for speedy trial does not constitute a waiver. State v. Zaehring, 306 N.W.2d 792, 795 (Iowa 1981). The State, not the defendant, bears the responsibility for bringing the defendant to trial within the specified period. We conclude that the trial court did not abuse its discretion in ruling there was no waiver of the right to speedy trial.

AFFIRMED.