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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

429

STATE OF IOWA,)
Plaintiff-Appellant,)
vs.)
STEPHEN KIRK WILSON,) 8-485
87-1687
Defendant-Appellee.)

Appeal from the Iowa District Court for Polk County (36241), Theodore H. Miller, Judge.

The State appeals from the trial court's order dismissing the trial information on speedy indictment grounds. **AFFIRMED.**

Thomas J. Miller, Attorney General; Mark Joel Zbieroski, Assistant Attorney General; and Melodee Hanes and James Ward, Assistant Polk County Attorneys, for plaintiff-appellant.

Scott Sobel, Des Moines, for defendant-appellee.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

HAYDEN, J.

This case concerns the dismissal of a criminal prosecution against the defendant, Stephen Kirk Wilson, pursuant to rule 27(2)(a), Iowa Rules of Criminal Procedure. That rule provides:

> [W]hen an adult is arrested for the commission of a public offense and an indictment is not found against him within forty-five days (45), the court must order the prosecution to be dismissed

On May 8, 1987, the Des Moines Police Department received a phone call a package containing a controlled substance had been shipped to the United Parcel Service (UPS) facility in Des Moines. The police followed through by going to the UPS facility and inspecting the package. A chemical field test on the package's contents revealed that it contained a schedule II controlled substance with a cocaine base.

The defendant was arrested after he picked up the package from UPS. He was given his Miranda rights and then transported to the Des Moines Police Department where he was booked on the arrest record. The arrest record entry for the defendant was "ASG NU," a designation that his arrest was being assigned to the Narcotics Unit for further investigation. The defendant was detained for approximately three hours and then unconditionally released after being informed by the police he was not being charged with any crime.

On May 13, 1987, the seized package was turned over to the Department of Criminal Investigation for analysis. This analysis was completed on June 14, 1987, and the package was returned to the Des Moines Police Department.

The police later checked the container inside the package for fingerprints. This analysis was completed on June 26, 1987, some nine days after the forty-five days had run on the May 8th arrest. It revealed defendant's fingerprints were on the container inside the package.

On June 29, 1987, an arrest warrant was issued for defendant pursuant to a preliminary information which charged the defendant with possession with intent to deliver a schedule II controlled substance. See Iowa Code § 204.401(1) (1987). Defendant was arrested on August 6 and appeared on August 7. A trial information was filed on September 17, 1987.

Defendant filed a motion to dismiss the trial information pursuant to Iowa Rule of Criminal Procedure 27(2)(a) on September 8, 1987. The trial court, after a hearing on the matter; dismissed the trial information on November 4, 1987.

Our scope of review is at law. Iowa R. App. P. 4.

The State contends the trial court erred in ruling Wilson's arrest on May 8 triggered the running of the speedy indictment clock. The State submits Iowa Rule of Criminal Procedure 27(2)(a) applies only to a defendant who

has been arrested and formally charged with a public offense, not to one who is released before being charged. Further, the State urges even if Wilson's arrest started the speedy indictment clock running, his unconditional release three hours later should have stopped it.

We set forth the pertinent portion of rule 27(2)(a) as follows:

> 2. **Speedy trial.** 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. . . .
>
> a. When an adult is arrested for the commission of a public offense, . . . and an indictment is not found against him within forty-five days, the court must order the prosecution to be dismissed, unless good cause to the contrary is shown or the defendant waives his right thereto.

The forty-five day time period for indictment commences upon the arrest of the individual. See Beeks, 428 N.W.2d at 309; State v. Sunclades, 305 N.W.2d 491, 493 (Iowa 1981). The term "arrest" is defined in Iowa Code section 804.5 (1987):

> Arrest 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 to custody.

When a statute is plain and its meaning unambiguous, courts may not search for meaning outside of its expressed terms. State v. Sunclades, 305 N.W.2d at 494. The State refers us to cases construing former Iowa Code section

795.1[1] and also to federal cases that utilize a different definition of "arrest" in construing the federal counterpart to rule 27(2)(a).[2] We do not discuss or rely upon those cases as they are not aplicable here.

The term "arrest" is defined by statute. The statute is clear and unambiguous and needs no special construction. It is clear to us defendant was first arrested on May 8, 1987. There is no dispute defendant was arrested because of this drug transaction and alleged violation, although not formally charged on the books from the time of arrest to time of release from jail on this arrest.

The Iowa Supreme Court held in the case of State v. Sunclades, 305 N.W.2d 491, 494 (Iowa 1981), the plain language of rule 27(2)(a) provides that the period of time during which an indictment must be returned commences when

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1. Iowa Code section 795.1 (1972) provided:

   When a person is held to answer for a public offense, if an indictment is not found against him within thirty days, the court must order the prosecution to be dismissed, unless good cause to the contrary be shown. (Emphasis added.)

2. 18 U.S.C. section 3161(b) (1982) states in part:

   Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charge.

the defendant is arrested. (Emphasis added; citations omitted.) The forty-five day period of rule 27(2)(a) that commenced when defendant was arrested applied only to that charge and lesser-included offenses thereof it does not apply to separate charges. Id.

We note two drug charges arising from this transaction could have been filed against defendant at the time of his arrest. These are possession of a schedule II controlled substance, to wit, cocaine, per Iowa Code section 204.401(3) (1987), and possession of a schedule II controlled substance, to wit, cocaine, with intent to deliver per Iowa Code section 204.401(1) (1987). The former charge is a lesser-included offense of the latter. Both are based upon the same act and deed and are not separate crimes one from the other.

The State does not argue good cause for delay or extending the time to file a formal charge against defendant beyond the 45 days from his date of arrest, nor do we find any.

Here we hold defendant's unconditional release from jail after being arrested on this drug transaction does not stop the clock on his speedy trial time.

AFFIRMED.

Sackett, J., concurs; Habhab, J., dissents.

HABHAB, J. (dissenting)

I respectfully dissent. I do so for the reasons hereafter stated.

The Iowa Supreme Court held in Sunclades that the forty-five-day time period in rule 27(2)(a) applies only to the "public offense" for which the defendant was arrested and not to all offenses arising from the incident which led to the defendant's arrest. 305 N.W.2d at 494. Thus, under the circumstances here, since the forty-five days had run on the May 8 arrest prior to the State's filing of an indictment, the "public offense" for which the defendant was initially arrested and any lesser-included charges would be subject to dismissal. Id.

The question thus becomes what was the public offense for which the defendant was initially arrested on May 8. In arriving at this factual determination, the trial court should consider only those facts and circumstances which were present at the time of the initial arrest. Where, as here, the defendant has been arrested more than once for public offenses stemming from the same incident or event, the trial court must avoid looking at any subsequent charge in arriving at the public offense for which the defendant was initially arrested. Absent the fact that the police subsequently charged Mr. Wilson with possession of cocaine with intent to deliver, the record is devoid of any evidence that the initial arrest of the defendant was for

the greater charge of possession of cocaine with intent to deliver and not the lesser charge of possession. See Iowa Code § 204.401(3) (1987). The problem with considering the subsequent charge in arriving at the initial charge is that in so doing rule 27(2)(a) becomes episodic in nature. Such a result is contrary to Sunclades, 305 N.W.2d at 494.

Under the record here it is clear that the defendant's initial arrest was only for the public offense of possession of cocaine in violation of Iowa Code section 204.401(3). It is true that defendant could have been charged with intent to deliver, but he was not, and I find nothing in the record that reveals that this charge was even considered.

I conclude that the forty-five-day period of rule 27(2)(a) that commenced when the defendant was arrested applied only to the charge of possession of cocaine. It did not apply to the separate crime of possession with intent to deliver, and since possession of cocaine with intent to deliver is not a lesser-included offense of possession of cocaine, the dismissal of the lesser charge would not prevent the prosecution of the former. See State v. Eichhorn, 325 N.W.2d 95, 96 (Iowa 1982); Sunclades, 305 N.W.2d at 494 (Although the forty-five-day rule applied in the dismissal of a murder charge for which the defendant was arrested, it did not apply from that date of arrest to the separate charges of going armed with intent and assault

while participating in a felony, to-wit: going armed with intent, which are not lesser-included offenses of murder.).

I disagree for one other reason. Rule 27(2)(a) provides that if an indictment is not found against an adult within forty-five days from the date of his arrest for the commission of a public offense, the court must order the prosecution dismissed, unless good cause to the contrary is shown or the defendant waives his right thereto. Under that rule the date of the arrest for the commission of a public offense starts the running of the forty-five days.

However, I would hold that where, as is the case here, the defendant is unconditionally released after the arrest that this stops the running of the time period. This is so for the defendant is no longer under arrest for the commission of a public offense. I believe this result is consistent with the overall purpose of rule 27(2)(a), which is oftentimes referred to as the "speedy indictment" rule.

The purpose of rule 27 is stated at section 2 thereof as follows: "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." In many respects, it implements article I, section 10 of the Iowa Constitution and the sixth amendment right to a speedy trial under the United States Constitution. State v. Allnutt, 156 N.W.2d 266, 268 (Iowa 1968).

The purpose of speedy indictment and speedy trial protections, both constitutional and statutory, is:

> To relieve one accused of a crime of the hardship of indefinite incarceration awaiting trial or the anxiety of suspended prosecution, if at liberty on bail, and to require courts and peace officers to proceed with the trial of criminal charges with such reasonable promptness as proper administration of justice demands.

Id.

With that purpose in mind, I do not believe that the forty-five-day time should continue to run against the State where the defendant is unconditionally released. Once the defendant was released, he was under no more jeopardy or hardship than any other citizen. There were no charges pending, nor were they in the midst of criminal prosecution.

We know that if charges were brought within the forty-five-day period and later dismissed, the speedy trial guarantee under the sixth amendment to the United States Constitution is no longer applicable. United States v. MacDonald, 456 U.S. 1, 71 L. Ed. 2d 696, 102 S. Ct. 1497 (1982). We also know that under rule 27(1) that if a criminal prosecution is dismissed by the court in the furtherance of justice, that although the "dismissal is a bar to another prosecution for the same offense if it is a simple or serious misdemeanor," it is "not a bar if the offense charged be a felony or an aggravated misdemeanor"; and that "furtherance of justice" under this rule includes

facilitating the state in gathering evidence, procuring witnesses, or plea bargaining. Iowa R. Crim. Pro. 27(1); State v. Fisher, 351 N.W.2d 798, 800-01 (Iowa 1984); see also State v. Lundean, 297 N.W.2d 232 (Iowa App. 1980) (relevant considerations in determining whether to dismiss).

For the most part then, the clock stops when a case is dismissed under rule 27(1); I believe the same result should obtain when a defendant, after an arrest, is unconditionally released for once a defendant is unconditionally released, he is no longer under arrest for the commission of a public offense. I would reverse.