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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,)
Appellee,) Filed January 31, 1978
vs.)
JON ROBERT WILLIAMS,) 376 / 60013
Appellant.)

Appeal from Johnson District Court - Louis Schultz and Robert Osmundson, Judges.

Defendant appeals his conviction of delivery of a controlled substance, in violation of § 204.401(1), The Code 1973, alleging error in trial court's admonition to the jury to disregard certain testimony and rulings on his motion to set aside the information and his attorney's application to withdraw as counsel. AFFIRMED.

R. Brent Daniel, of Pritzker & Glass, Ltd., of Chicago, Illinois, and M. Phelan, of Johnson & Phelan, of Fort Madison, counsel for appellant.

Richard C. Turner, Attorney General of Iowa, J. Susan Carney, Assistant Attorney General, and Jack W. Dooley, Johnson County Attorney, counsel for appellee.

Heard by Allbee, C. J., Donielson, Snell, Oxberger and Carter, JJ.

DONIELSON, J.

Defendant-Jon Robert Williams appeals his conviction of delivery of a schedule I controlled substance, to wit: LSD, in violation of § 204.401(1), The Code 1973. He now asserts that the trial court erred by (1) overruling his motion to set aside the information; (2) denying his court-appointed attorney's application to withdraw as counsel; and (3) inadequately admonishing the jury to disregard improper and prejudicial rebuttal testimony offered by the State.

I. Motion to Set Aside Information

Williams contends that the lengthy two and one-half year delay between the occurrence of the offense in question and the filing of the County Attorney's Information denied him due process of law under the Fifth and Fourteenth Amendments to the United States Constitution. He does not assert any violation of his speedy trial rights under either the Sixth Amendment or the Iowa statute, chapter 795, The Code 1975.

The offense which formed the basis for the instant charge occurred July 30, 1973, and a County Attorney's Information was filed against Williams on January 13, 1976, resulting in a delay of approximately 30 months. In ruling upon defendant's Motion to Set Aside the Information, the trial court found that the 30 month delay was substantial, but concluded that Williams had not shown that he was prejudiced thereby.

In the recent case of State v. Burrell, 255 N.W.2d 119 (Iowa 1977), this precise issue was addressed by our supreme court. There, defendant challenged the preaccusatory delay on due process grounds. The court stated that generally a person is protected against prosecution of state charges by the statute of limitations, id. at 121; see United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), although the statute of limitations does not fully define an individual's rights prior to indictment or information. See §§ 752.3 and 769.13, The Code 1975; United States v. Lovasco, ____ U.S. ____, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977); State v. Davis, 259 N.W.2d 843, 845 (Iowa 1977).

In **Burrell**, the court adopted the criteria employed by the federal courts in analyzing allegations of preaccusatory delay. The Eighth Circuit has utilized a balancing test in which the trial court weighs the reasonableness of the delay against the prejudice to the defendant. State v. Burrell, supra, at 121; United States v. Jackson,

504 F.2d 337, 339 (8 Cir. 1974), cert. denied, 420 U.S. 964, 95 S.Ct. 1356, 43 L.Ed.2d 442 (1975); United States v. Naftalin, 534 F.2d 770, 772-773 (8 Cir.), cert. denied, 429 U.S. 827, 97 S.Ct. 83, 50 L.Ed.2d 89 (1976); United States v. Page, 544 F.2d 982, 984 (8 Cir. 1976). The burden of proving substantial prejudice due to such delay is upon the defendant, United States v. Quinn, 540 F.2d 357, 361 (8 Cir. 1976), and the trial court's finding on the prejudice issue must stand unless clearly erroneous. United States v. Jackson, supra, at 341; United States v. Barket, 530 F.2d 189, 193 (8 Cir.), cert. denied, 429 U.S. 917, 97 S.Ct. 308, 50 L.Ed.2d 282 (1976).

Williams alleged that the substantial delay resulted in his inability to locate two witnesses who presumably would have given testimony favorable to him. However, after reviewing the record in the instant case, we cannot say that defendant has shown sufficient prejudice to justify a dismissal of the information or that the finding of the trial court was clearly erroneous.[1] In the absence of a showing of prejudicial or intentional preaccusatory delay, we are not inclined to construe the due process clause to serve as a substitute for the legislatively imposed statute of limitations.

II. Application of Counsel to Withdraw

Williams also argues that the trial court's denial of his court-appointed attorney's application to withdraw as counsel violated his rights to due process of law and assistance of counsel under the Fifth, Sixth, and Fourteenth Amendments to the U. S. Constitution. See Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

We initially decide that Williams' claim of a denial of his Sixth Amendment right to counsel is without merit, inasmuch as he was ably represented by counsel at all stages of the proceedings against him. However, Williams also contends that he had a right to be represented by counsel of his own choosing and that the court's refusal to permit substitution of counsel denied him due process of law and the effective assistance of counsel. See Dennis v. United States, 340 U.S. 887, 71 S.Ct. 133, 95 L.Ed. 644 (1950).

[1] It is noteworthy that in addition to defendant's requests to substitute counsel which, if granted, would have necessitated a continuance of the trial, three continuances requested by him were granted by the trial court after the Information was filed.

The record reflects that on July 28, 1976, the trial of this cause was set for October 11, 1976. On Thursday, October 7, Williams informed his court-appointed attorney that he was dissatisfied with his services and had obtained funds in order to obtain private counsel. The attorney asked for leave to withdraw as counsel, but his application was denied by Judge Schultz. On Friday, October 8, another attorney that defendant sought to represent him discussed the possibility of a continuance with Judge Schultz, but, after learning that one would not be granted, indicated that he would only represent Williams on appeal. That same day, the court-appointed attorney asked the court to reconsider its previous ruling on his application to withdraw but the court denied his request. On Monday, October 11, just before the trial was scheduled to begin, the attorney renewed his application to withdraw, which was denied by Judge Osmundson.

At a hearing held immediately prior to the commencement of trial, Williams testified that he was dissatisfied with his court-appointed attorney because he was unhappy with a proposed plea bargain agreement negotiated with the county attorney's office. He also indicated that he felt that the court-appointed attorney might not handle his appeals properly and that he needed an attorney with more experience in drug-related cases. However, Williams was unable to point to any specific instances in which his court-appointed attorney had failed him and he admitted that the attorney had represented him to the best of his ability. In fact, the attorney had apparently represented Williams in several other related matters with a moderate degree of success.

The law is settled that when an indigent defendant is dissatisfied with his court-appointed counsel, he has the right to request the appointment of new counsel, stating the reasons for his dissatisfaction. The trial court then determines the propriety of appointment of new counsel. Roberts v. Bennett, 258 Iowa 1101, 1107, 141 N.W.2d 628 (1966); State v. Taylor, 211 N.W.2d 264, 267 (Iowa 1973). Further, it is presumed that a court-appointed attorney for an indigent defendant acts properly. State v. Kendall, 167 N.W.2d 909, 910 (Iowa 1969). Allegations of inadequate representation, such as to be constitutionally deficient, must be supported by more than speculative, generalized argument. **Id.** at 911; see State v. McKee, 223 N.W.2d 204, 206 (Iowa 1974).

No constitutional violation arises by the refusal of the trial court to appoint new counsel unless, upon a review of the totality of the facts in a given case, there can be found a denial of fundamental fairness, and the burden of proof is upon the defendant to show that his constitutional rights have been violated. Roberts v. Bennett, supra, 258 Iowa at 1107-1108. We are aware of no reason to apply a different standard in the instant case.

Both district court judges thoughtfully considered and denied the court-appointed attorney's application to withdraw from the case. We have reviewed the record and can find no circumstances indicating a denial of fundamental fairness. See United States v. Black, 412 F.2d 687, 691 (6 Cir. 1969), cert. denied, 396 U.S. 1018, 90 S.Ct. 583, 24 L.Ed.2d 509 (1970).

III. Admonition Regarding Improperly Admitted Evidence

Finally, Williams contends that the trial court inadequately admonished the jury regarding improperly admitted evidence in an attempt to cure any prejudicial effect resulting from its reception at trial, and, consequently, he was denied a fair trial. Initially, we hold serious doubts whether defendant properly preserved this specific issue for appellate review. The issue presented herein was not raised in defendant's motion for directed verdict or new trial, nor did defendant make a motion for mistrial, which would have been the most effective method of apprising the trial court of the contention asserted here on appeal. State v. Johnson, 243 N.W.2d 598, 604-606 (Iowa 1976). Nevertheless, we will address the merits of this issue.

The general rule is that the prejudicial effect of improper testimony may be avoided if the trial court strikes it from the record and gives a cautionary instruction to the jury, and it is only in those exceptional cases in which the prejudicial effect of the testimony cannot be eliminated that such an instruction will be held to be insufficient. State v. Mattingly, 220 N.W.2d 865, 870 (Iowa 1974); State v. Burrell, supra, at 122. Upon a review of the record, we conclude that the trial court adequately admonished the jury and do not believe that this constitutes one of those exceptional cases referred to in **Mattingly**. The judgment of the district court is affirmed.

AFFIRMED.