FILED
JAN 31 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Appellee,

v.

LEONARD MICHAEL TYLER,

Appellant.

Filed January 31, 1978

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60037

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Appeal from Black Hawk District Court - Eric M. Knoernschild, Magistrate.

Defendant appeals two convictions of driving a motor vehicle after his driver's license had been revoked under the habitual traffic offender provisions of §§ 321.555 - .562, The Code. Reversed in part, and remanded.

Paul T. Shinkle, of Ackerman & Shinkle, of Cedar Falls, for appellant.

Richard C. Turner, Attorney General, Thomas A. Evans, Jr., Assistant Attorney General, and An C. Bergstrom, Assistant Black Hawk County Attorney, for appellee.

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

PER CURIAM

Leonard Michael Tyler has twice been convicted of driving a motor vehicle after his driver's license had been revoked under the habitual traffic offender provisions of the Code, §§ 321.555-.562. Trial court sentenced him to two years in the Men's Reformatory at Anamosa for each offense, the sentences to run concurrently. We consider five of his six assignments of error. Four assignments apply to both convictions.

Defendant's first two complaints, which challenge the constitutionality of § 321.561 and the punishment it provides, must be rejected on the basis of State v. Robbins, 257 N.W.2d 63, 66-68 (Iowa 1977).[1]

In the third division of his written argument, defendant contends that failure to provide him with counsel at the license revocation hearing was a violation of his right to counsel under the sixth amendment to the Federal Constitution. He raises no 14th amendment due process or equal protection issues on this appeal. Nor were any raised at trial.

The license revocation proceeding under § 321.559, The Code, is civil. Cf. State v. Scheffel, 82 Wash. 2d 872, 514 P.2d 1052, 1056-57 (1973). The sixth amendment applies, by its own terms, only to criminal proceedings. The precise question presented here was thoroughly discussed in Ferguson v. Gathright, 485 F.2d 504 (4th Cir. 1973), cert. denied 415 U.S. 933 (1974). That authority clearly demonstrates that defendant's complaint is without merit. See also Dixon v. Love, 431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977).

Defendant next argues that his right in Black Hawk County number 3566 to speedy trial under § 795.2, The Code, was violated. He was charged by information on May 12, 1976, and tried on September 29, 1976. The State has the burden to show "good cause" for the delay. State v. Moehlis, 250 N.W.2d 42, 46 (Iowa 1977). No attempt was made to meet this burden. No significant action was taken in the case until after the 60 day period had expired. Defense counsel was appointed 16 days after time ran out. Therefore, defendant's conviction on this charge must be reversed.

[1] Alternatively, we note that all but one of defendant's contentions in his first assignment are "borrowed" in the same manner as those of the defendant in State v. Randall, 259 N.W.2d 543, 544 (Iowa 1977). They are without merit for that reason as well.

Finally, defendant contends that the prosecutor's promise, in her opening statement, to produce evidence of traffic violations in excess of those needed to prove the defendant was a habitual offender was prejudicial. Because the record shows the parties and the court were in substantial agreement regarding the nature of the prosecutor's comments, we will review the contention in spite of the absence of a bill of exceptions. State v. Swallom, 244 N.W.2d 321, 324 (Iowa 1976). Trial court is vested with broad discretion in determining whether prosecutorial misconduct such as that present here was sufficient to deprive defendant of a fair trial. State v. Swallom, supra at 325. We find no abuse of discretion in this instance.

Our disposition of defendant's fourth assignment makes consideration of his sixth unnecessary. The judgment in number 3566 is reversed and the case remanded for dismissal of the prosecution. Because we have voided the judgment in 3566, and because trial court may have taken the fact that there were two offenses into consideration in fixing the sentences, we vacate the sentence in 3912 and remand to trial court for resentencing without regard to the second conviction.

We do not intimate that the new sentence need be less than the present sentence.

Reversed in part, and remanded.