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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Appellee,) Filed November 10, 1977
vs.)
ROYAL KERRY BATTLES,)
Appellant.) 214/58322

Appeal from Polk District Court - Waldo F. Wheeler, Judge.

Defendant appeals conviction of possession of controlled substance with intent to deliver, in violation of § 204.401, The Code, assigning as error rulings of trial court on his objection to admission of testimony; motions to dismiss for failure to comply with the speedy trial provisions of Chapter 795, The Code; and motion for continuance in order to present rebuttal evidence. AFFIRMED.

Joseph Z. Marks and Joseph L. Marks, of Des Moines, counsel for appellant.

Richard C. Turner, Attorney General of Iowa, and Dan Johnston, Polk County Attorney, counsel for appellee.

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

DONIELSON, J.

Defendant-Royal Kerry Battles appeals his conviction of possession of a controlled substance with intent to deliver, a violation of § 204.401(1), The Code. We affirm.

On appeal, Battles raises issues relating to speedy trial, an evidentiary ruling, and a motion for continuance. Many of these same issues, as well as most of the critical facts, are discussed in a companion case, State v. Potts, 240 N.W.2d 654 (Iowa 1976). A joint County Attorney's Information charging the defendant and Potts was filed, but the two were tried separately. However, many of the pre-trial proceedings were either conducted jointly or were nearly identical in substance.

I. Speedy trial.

A. Defendant's first assignment of error is that the trial court erred by not dismissing the prosecution because the State failed to indict or inform against him within 30 days after he was held to answer, pursuant to § 795.1, The Code. He argues that he was held to answer on July 30, 1974, and was not indicted or informed against within 30 days because the County Attorney's Information filed on August 21 was subsequently found to be invalid, and a valid one was not filed until November 4. However, Battles misconstrues § 795.1.

Defendant is correct in his statement that he was held to answer when he waived his preliminary hearing on July 30. State v. Morningstar, 207 N.W.2d 772, 775 (Iowa 1973). When the State filed an Information on August 21, it complied with the literal requirements of § 795.1. When Battles' demurrer to the Information was sustained on September 26, the Information was dismissed and consequently, there were no pending criminal charges after that date. We agree with the State that Battles was no longer "an accused" at that time and therefore the speedy trial provisions of Chapter 795 were no longer applicable. See United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468, 478-479 (1971).

When a valid Information was filed on November 4, Battles was again "an accused" and the requirements of Chapter 795 were triggered. See State v. Potts, supra, at 656. An adoption of the view espoused by defendant would lead to an absurd result. He claims that a valid Information or Indictment should have been filed by August 29, 1974. However, Battles did not even file his demurrer until August 30, and it was not sustained until September 26. In other words, none of the parties were even aware that

this first Information was invalid until after the 30-day period had run. The State cannot be held responsible for something it could not have known. Consequently, the only logical conclusion is that when the valid Information was filed, Battles was again "an accused" compelled to answer for the commission of a public offense according to the terms of § 795.1. Since the prior dismissal of the felony charge did not bar the State from later filing charges against Battles for the same offense, State v. Miller, 259 Iowa 188, 190, 142 N.W.2d 394 (1966), we find no violation of § 795.1.

B. Battles also asserts that the trial court erred in overruling his motion to dismiss made pursuant to § 795.2, The Code, because he was not tried within 60 days of being informed against, and no good cause existed to justify delay beyond that period. As did the **Potts** court, we have concluded that Battles' speedy trial rights did not attach until a valid Information was filed on November 4, 1974. State v. Potts, supra, at 656. Consequently, his first motion to dismiss filed November 15 was premature under this holding.

Analogous to the situation in **Potts**, defendant's second motion to dismiss was filed January 30, 1975. It was overruled on February 7, at which time the court granted a 90-day continuance beyond January 3, 1975 in which to bring Battles to trial. In other words, Battles could be tried as late as April 3, 1975, in accordance with §§ 795.2 and 795.3 and the February 7 order.

For purposes of this appeal, we will consider Battles' § 795.2 argument with respect to this second motion to dismiss. Although 60 days had already run by the time Battles filed this motion on January 30, we conclude that the trial court did not err in finding that "good cause" existed to justify the delay.

The prosecutor had alleged below that he was unable to answer all questions contained in the bill of particulars propounded by defendant on November 15 because he had not been able to locate a confidential informant who possessed information which was needed in order to respond to the questions. After a hearing on the motion to dismiss, the court concluded that the State had demonstrated "good cause" because of the prosecutor's diligent efforts in attempting to locate the informant. At that hearing, conflicting testimony was presented regarding whether State officials had in fact known the whereabouts of the informant all along and consequently, whether the prosecutor

had actually made diligent efforts to locate him. This identical set of circumstances was discussed in **Potts**, court, supra, at 656, and is equally applicable here:

> "Trial court found the assistant county attorney had made diligent effort to locate the confidential informant and his address and provided additional time until February 20, 1975, for this purpose. Although on the record an inference might have been drawn the police and county attorney's office knew one of the informant's various residences, there was solid evidence upon which trial court based its finding."

Where a speedy trial challenge is made, the burden is on the State to establish good cause at the trial court level. State v. Moehlis, 250 N.W.2d 42, 46 (Iowa 1977); State v. LaPlant, 244 N.W.2d 240, 242 (Iowa 1976); see generally, State v. Hathaway, _____ N.W.2d _____ (Iowa, filed September 21, 1977). However, our review of a determination of good cause is not **de novo**. State v. Donnell, 239 N.W.2d 575, 579 (Iowa 1976). To secure a reversal defendant must show the trial court abused its limited discretion. State v. Potts, supra, at 656; State v. Albertsen, 228 N.W.2d 94, 98 (Iowa 1975).

Furthermore, in State v. Moehlis, supra, at 46, the court held that delay attributable to the defendant may constitute "good cause" and "a defendant must accept such passage of time as is reasonably necessary for action upon his own motions and applications." See State v. Donnell, supra; State v. Collins, 236 N.W.2d 376, 377-378 (Iowa 1975).

We hold, as did the **Potts** court, that the trial court did not abuse its limited discretion in overruling the motion to dismiss. State v. Grady, 231 N.W.2d 869, 872 (Iowa 1975). With reference to the dispute regarding the diligence of the State in attempting to locate the informant, the **Potts** court, supra, at 656, stated:

> "There was a disputed question of fact involved here. Trial court's decision, upon conflicting evidence, is controlling. See State v. Ebelsheiser, 242 Iowa 49, 60, 43 N.W.2d 706, 713 (1950)."

Further bases for such a holding as expressed in **Potts** are controlling here as well:

> "On the whole record, it is plain defense counsel was throwing up road blocks to speedy trial even while filing the several motions to dismiss. The State requested arraignment of this defendant and Battles at the hearing on the first motion to dismiss. This was resisted by both defense counsel because a bill of particulars filed by Battles' counsel was on file. Some of the responses required information from the informant whom the assistant county attorney could not locate." **Potts**, supra, at 656.

We further hold, as did the court in State v. Moehlis, supra, that much of the delay was attributable to the many motions filed by the defendant which required action by the court. Between November 15, 1974 and April 4, 1975, defendant filed four motions to dismiss, a motion for bill of particulars, a motion for the court to make findings of fact and conclusions of law regarding the first motion to dismiss, a motion to suppress, a motion in limine, and a motion for injunction. Although the State is not blameless due to its long delay in responding to the motion for bill of particulars, we cannot help but conclude that much of the delay was attributable to defendant. The staggering number of motions convinces us, as it did the **Potts** court, that

> "[i]t is obvious defendant never wanted a speedy trial. He did everything possible to avoid trial while filing motions to dismiss because it was not provided. The right to a dismissal for failure to provide trial should not turn on defense gamesmanship or success in whipsawing the prosecution." **Potts**, supra,, at 657. (emphasis added)

See State v. Truax, 232 N.W.2d 861, 862-863 (Iowa 1975).

Consequently, we conclude that (1) the trial court did not abuse its discretion in finding "good cause" due to the diligence of the state and (2) much of the delay was attributable to Battles.

C. As his final speedy trial assignment of error, Battles argues that the court should have dismissed the charge because the State failed to try him within 90 days beyond the date within which the trial would otherwise be required, § 795.3, The Code. As defendant notes, §§ 795.2 and 795.3 must be read together so that if good cause is demonstrated under § 795.2, the court may continue the case, but in no event may it do so for more than 90 days beyond the time within which the trial would otherwise be required.

In the instant case, the 60-day period under § 795.2 expired January 3, 1975. In its order of February 7, the court, pursuant to its interpretation of § 795.3, extended the time for trial 90 days beyond January 3, to April 3, 1975. On February 26, defendant was arraigned and at that time, the court issued an order which set trial for April 7 and a pre-trial conference for March 14. After that pre-trial conference, an order, signed by the defendant and both counsel, was entered in which April 7, 1975, was formally agreed upon as the date for trial.

Battles claims that even the April 7 trial date was four days beyond the time prescribed by the February 7 continuance order, and therefore § 795.3 requires dismissal. Again, the **Potts** court addressed this identical issue:

> "Defendant, present and with counsel, did not resist the trial date set or assert he wanted an earlier date either at . . . [arraignment] or at the March 14 pre-trial hearing." **Potts**, supra, at 656.

On March 14, Battles renewed his motion to dismiss, but did not make any reference to the trial date which had been set. This motion was denied on April 4. That same day, Battles again renewed his motion to dismiss alleging violation of § 795.3, The Code. That motion was also denied by the court.

Upon a review of the record, we hold that defendant is estopped to assert any right he had to an earlier trial. With regard to this issue, the **Potts** court stated:

> "We distinguish this situation from that in State v. Wright, 234 N.W.2d 99, 104 (Iowa 1975) where we held defendant was not obligated to ask for an earlier retrial date. There the trial date was set in the absence of defendant and counsel." (emphasis added). **Potts**, supra, at 657.

In arriving at our conclusion in the instant case, we find, as did the trial court, that there is nothing in the record to indicate that Battles specifically objected to the April 7 trial date. It should be kept in mind at this point that by the time the pretrial conference was held on March 14, the trial court had before it three motions to dismiss involving some or all of §§ 795.1, 795.2 and 795.3. We cannot say that Battles' general objection to "any trial date" at the pre-trial hearing was sufficient to apprise the trial court of his specific § 795.3 objection. One of the primary purposes of requiring attorneys to make proper and specific objections is to give the trial court the opportunity to prevent or correct errors of law. Here,the objection made was not sufficient to permit the court to do so.

In deciding this issue, we do not require that trial counsel be forced to "continue to match his will against that of the trial court" as the special concurrence would suggest. Rather, we require that counsel be specific enough in his objection so as to fully alert the trial court of the exact substance of the objection and give the court the opportunity to move up the trial date, if it so desires, or take other appropriate action. The trial court found that defendant's attorney did not object to the April 7 trial date, and we agree.

Consequently, we hold that Battles was not denied a speedy trial under either §§ 795.1, 795.2 or 795.3, The Code.

II. Evidentiary ruling

Battles argues that the court erred in permitting Officer Leitzke to give his opinion as to whether, based upon his experience as a narcotics officer and the evidence obtained in this case, the quantities were possessed with intent to deliver. He asserts that it is reversible error for an expert to give a legal conclusion concerning the degree of defendant's guilt and that by admitting this testimony, the court allowed Leitzke to give his opinion as to the guilt of the defendant. State v. Ogg, 243 N.W.2d 620, 621 (Iowa 1976); State v. Horton, 231 N.W.2d 36, 38 (Iowa 1975). [1]

While Leitzke was being examined, the following record was made:

> "Q. (Mr. Sarcone) Okay. Now, Officer, based on the experience you have had as a narcotics officer and based on the exhibits in the fashion that you found them and under the circumstances, do you have an opinion as to whether or not this particular quantity under these particular circumstances was possessed with intent to deliver? A. (Officer Leitzke) I do.
> Q. What is your opinion?
> MR. MARKS: Your Honor, I would object as calling for an opinion and conclusion of the witness, no proper foundation having been laid. It also invades the province of the jury.
> THE COURT: Overruled. A. It's my opinion in my experience in the last year and a half that this quantity of marijuana is far in excess of what a person -- a user would have on hand for his own personal use."

Although defendant objected to this question at trial as calling for an opinion and conclusion of the witness, etc., he argues on appeal that it was error for an expert to express a legal conclusion regarding defendant's guilt. Such a distinction would seem to be a technical one, but it proved to be dispositive in State v. Hines, 223 N.W.2d 190, 193 (Iowa 1974). In **Hines**, a prosecution under the same statute, the court held that error was not preserved where the question asked was whether the witness had an opinion as to what defendant was doing in the area where the offense occurred. Defendant objected at trial on the grounds that the question invaded the province of the jury and

[1] The issue discussed in the argument section of defendant's brief on this subject appears to vary significantly from that contained in the assignment of error. In that assignment, Battles claims that it was error to permit Leitzke to testify as to his opinion whether, based upon the exhibits and circumstances of this case, the particular quantity involved was possessed with intent to deliver. Although this distinction seems overly technical, it has sweeping consequences.

went to the ultimate fact, and he objected on appeal on the ground that the question called for an opinion as to the ultimate issue. Holding these objections insufficient to preserve error, the **Hines** court stated that the proper objection should have been that the question

> "... called for answers not a proper subject of expert testimony because they were within the scope of the jurors' common knowledge and would not help the jury." State v. Hines, supra, at 193.

The court also held that the grounds of the objection were not specific enough to direct the court's attention to the valueless nature of the testimony sought. Id.; Accord, State v. Horton, 231 N.W.2d 36, 38 (Iowa 1975).

In State v. Sheridan, 247 N.W.2d 232, 235-236 (Iowa 1976), a case dealing with the same police officer, offense and question involved in the instant case, the court held that the general objection made, virtually identical to the one made in this case, did not preserve error. However, the court did pass upon the very specific portion of the objection made at trial which was assigned as error by the defendant, and concluded that no basis for reversal existed. Following the posture adopted by the **Sheridan** court, we, too, conclude that defendant's objection and assignment of error afford him no relief.

III. Continuance

Battles finally argues that the trial court erred in refusing to grant a continuance in order to permit him to present surrebuttal evidence. A continuance should only be granted when the trial court is satisfied that substantial justice will be more nearly obtained if a delay in the proceedings is permitted. State v. Johnson, 219 N.W.2d 690, 697 (Iowa 1974); State v. Birkestrand, 239 N.W.2d 353, 360-361 (Iowa 1976). However, this determination rests in the trial court's broad discretion. State v. Harris, 222 N.W.2d 462, 465 (Iowa 1974).

Furthermore, a trial court has considerable latitude in deciding whether to admit rebuttal evidence, State v. Hansen, 225 N.W.2d 343, 351 (Iowa 1975), and the court's decision will not be disturbed except for clear abuse of discretion. State v. McCullough, 226 N.W.2d 216, 217 (Iowa 1975). Upon a review of the record, we find no abuse of discretion.

Finding no error, we affirm the judgment of the district court.

AFFIRMED.

All judges concur except Oxberger, J., and Carter, J., who concur specially.

CARTER, J. (specially concurring)

I concur in Divisions IA, IB, II, III and the result. As to Division IC, I cannot agree that Battles' case is the same as Potts' case. Section 795.3, The Code, was at most only tangentially alluded to in the **Potts** case. The issue which Battles has presented in this appeal was clearly not presented in that case. Battles' contention involving § 795.3, in the trial court, by motion to dismiss, and on appeal centers upon the provision that "no continuance under this section shall be extended for more than ninety days beyond the date within which the trial would otherwise be required." Battles construes this to mean that in no event may the State try a defendant later than 150 days following indictment or information. This issue was not raised in the **Potts** case nor could it have been raised as the record shows Potts was tried within 142 days of the filing of the information against him. Thus, we should face the issue squarely.

In prior decisions, § 795.3, in a slightly different form, has not been given the construction which Battles propounds. During the period when the time limitations contained in § 795.3 and § 795.2 were expressed in relation to terms of court rather than fixed periods of time, it was recognized that the two statutes must be read together so those terms of court wherein the case was not tried as a result of causes attributable to defendant were not counted in considering the limit for continuances under § 795.3 (then established at three terms of court beyond the term in which defendant was to be brought to trial under § 795.2). Paul v. District Court, 231 Iowa 1027, 2 N.W.2d 151 (1942); Harris v. District Court, 226 Iowa 606, 284 N.W. 451 (1939); Davison v. Garfield, 219 Iowa 1258, 257 N.W. 432 (1935). The three-term rule was held to apply only to delays requested by the State. Postponements at the defendant's request are treated differently. Moreover, the words "whose trial has not been postponed upon his [defendant's] application" have been construed to encompass more than formal applications by defendant for continuance. In **Paul v. District Court**, supra at 1030, the court stated:

> [D]elay in trial due to the **action** or agreement **of defendant or his counsel** will be considered a postponement at his request. (emphasis added).

Similarly, in Pines v. District Court, 233 Iowa 1284, 1291, 10 N.W.2d 574 (1943), it was stated:

> It is a general rule and a sound one that if the accused is the cause or a contributing factor in the delay which passes the trial over the second or subsequent terms, he should not be entitled to a dismissal.

Harris v. District Court, supra, seems to hold that if at any time prior to the expiration of the time within which trial is ordinarily required under § 795.2, it is postponed, as a result of action of the defendant, the limit on continuances under § 795.3 simply has no application. See also **Paul v. District Court**, supra at 1029; **Davison v. Garfield**, supra at 1260.

In 1967, the legislature amended § 795.2 and § 795.3 so as to substitute specific time limitations for the time limitations previously related to terms of court. Acts 1967 (62 G.A.) ch. 400 §§ 259, 260. This was part of a general statutory revision resulting from the abolition of terms of court. As such, I do not perceive any intention to change the construction previously placed upon the statute. Indeed, there is language in the amended § 795.3 which is much more supportive of this construction than the former statute. This is found in the inclusion of the words "beyond the date within which trial would otherwise be required." Under the terms of § 795.2, I conclude that trial is not otherwise required within 60 days if postponed as a result of causes attributable to the defendant. The "good cause" continuances authorized by § 795.2 and § 795.3 up to a limit of 90 days, contemplate continuances sought by the State and not attributable to delays caused by defendant.

For the foregoing reasons, I conclude that the State was not bound to try Battles within 150 days of the filing of the information under § 795.3, because of substantial delays attributable to the defendant. I believe that there must also be considered whether, when there is reason not to try a defendant within the 60 day period prescribed by § 795.2 as a result of circumstances attributable to defendant, there is any specified time beyond the 60 day period in which the defendant must be brought to trial. In this case we must consider only statutory limitations as no constitutional issues are argued by defendant. I believe that if there is any statutory time limit in these situations it should approximate the original 60-day period, tolled by any periods of delay attributable to defendant. This is generally the approach taken under the federal speedy trial act; 18 U.S.C. § 3161(h).

Applying that rule to the present record I would hold that all of the delay prior to February 7, 1975, was attributable to the defendant, thus tolling the original 60-day period in its entirety. Battles' April 7, 1975 trial date was within 60 days of February 7, 1975, and, I conclude, not untimely. One may not delay his trial for three months and then expect his case to necessarily be superimposed over existing trial dockets involving cases which have not been delayed.

I do not agree with the majority's conclusion that Battles is estopped to assert his speedy trial rights for the reasons applied in the **Potts** case. Potts did not go on record as being opposed to the final trial date at the time it was set. Counsel for Battles did go on record as opposed to said date. I do not believe that he was thereafter required to continue to match his will against that of the trial court in order to protect his client's rights to assert a motion to dismiss based on either § 795.2 or § 795.3. But, for the reasons stated I conclude that his rights under these statutes were not violated and concur in the affirmation of the judgment.

OXBERGER, J., joins in this special concurrence.