

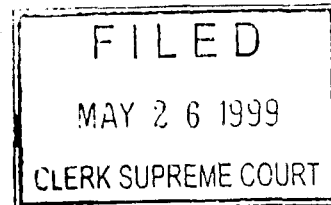
IN THE COURT OF APPEALS OF IOWA

No. 9-159 / 98-0115
Filed May 26, 1999

STATE OF IOWA,
Appellee,

vs.

DANNY RAY WOLGEMUTH,
Appellant.



Appeal from the Iowa District Court for Hamilton County, Timothy J. Finn,
Judge.

Danny Wolgemuth appeals his conviction and sentence, following a jury trial,
for third-degree burglary. **REVERSED AND REMANDED FOR NEW TRIAL.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney
General, and Patrick B. Chambers, County Attorney, for appellee.

Heard by Huitink, P.J., and Vogel and Zimmer, JJ.

VOGEL, J.

Danny Wolgemuth appeals his conviction and sentence, following a jury trial, for third-degree burglary. We reverse and remand for a new trial.

Background facts. On the morning of June 25, 1997, the superintendent of the Jewell Golf and Country Club reported to police that a break-in had occurred the previous evening. Deputy Sheriff Dennis Jackson arrived at the scene and was informed that a large safe, several blank checks, cigarettes, liquor, and assorted food items were missing. Deputy Jackson recovered the dial, handle and serial number of the safe along with several tools. The unopened safe was ultimately recovered several miles away.¹

In the early morning hours of June 25, 1997, Story City police officer Brian Haskin had been called to the Viking Motor Inn to investigate the possible theft of a vehicle. He arrived at the scene at approximately 3:30 a.m. and spoke to the owner. As they were speaking, the missing vehicle returned, driven by Wolgemuth. Officer Haskin observed that the vehicle was sagging in the back and that the shocks appeared to be shot. Officer Haskin also noticed that a large metal box was protruding from the trunk.

A few days later, Officer Haskin and Officer Stacy Newgard encountered Wolgemuth in a traffic stop. When they discovered there was an active warrant out for Wolgemuth, they took him into custody. The officers found several packages of

¹ Although the record does not reveal precisely when the safe was recovered, it was apparently recovered several days later.

cigarettes and bottles of liquor in the car and in Wolgemuth's motel room. Officer Newgard contacted Hamilton County Deputy Scott McConnell to inform him that they were holding some possible burglary suspects. McConnell and Newgard compared the items stolen in the break-in with the items found in the car and Wolgemuth's motel room.

Following further investigation, Wolgemuth was charged with third-degree burglary. Wolgemuth filed a motion to suppress which was denied by the district court. Wolgemuth's motion to dismiss for lack of speedy trial was also denied. A jury found Wolgemuth guilty as charged, and he now appeals.

I. Hearsay objections. Wolgemuth contends that the district court erred by allowing prejudicial hearsay testimony into evidence.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 801(c). Hearsay is generally inadmissible unless it falls within one of the enumerated exceptions set forth in the rules. *See* Iowa R. Evid. 802 & 803. If hearsay is admitted, prejudice to the non-offering party is presumed unless the contrary is established. *State v. Rice*, 543 N.W.2d 884, 887 (Iowa 1996). The admission of hearsay evidence is reviewed for corrections of errors at law. *See State v. Ross*, 573 N.W.2d 906, 910 (Iowa 1998). To the extent that Wolgemuth makes a claim regarding his constitutional right to confront witnesses, our review is de novo. *See State v. Hallum*, 585 N.W.2d 249, 256 (Iowa 1998).

Although Wolgemuth made many hearsay objections at trial, he most strongly objected to the admission of certain testimony by Deputy Jackson regarding the specific items stolen from the country club. At trial, the prosecution asked Jackson about a detailed list of the missing items. Voir dire established that the source of the list was someone other than Jackson. Defense counsel objected on grounds of hearsay and the confrontation clause. However, the trial court ruled that the list was “proper investigation and exception to the hearsay.” The list was later allowed into evidence as an exhibit over Wolgemuth’s objection.

The State asserts that the list was not hearsay, but was offered to explain the officer’s subsequent actions. Generally, an investigating officer may explain his actions by testifying as to what information he had and its source regarding the crime and the criminal. *State v. Reynolds*, 250 N.W.2d 434, 440 (Iowa 1977) (citation omitted). However, the scope of this evidence is limited and should not go beyond the point of explaining why certain responsive actions were taken by an officer. *See State v. Doughty*, 359 N.W.2d 439, 442 (Iowa 1984); *see also State v. Edgerly*, 571 N.W.2d 25, 29 (Iowa App. 1997). In certain instances the prejudicial character of specific information linking a defendant with the commission of a crime outweighs the probative value of the evidence thereof. *See Reynolds*, 250 N.W.2d at 440. In those cases, the testimony is so likely to be misused by the jury as evidence of the fact asserted that it should be excluded as hearsay. *See Doughty*, 359 N.W.2d at 442

(citing McCormick's Handbook on the Law of Evidence § 248, at 587 (2d ed. E. Cleary 1972)).

The list in question stated that the following items were stolen: a safe, blank checks, 25 packs of cigarettes (specifically, GPC, Camels, and Camel Lights), and five bottles of liquor (1 liter of Crown Royal, 1 quart of Jack Daniels, 1 quart of Bailey's Irish Creme, Peachtree Schnapps, and Butterscotch Schnapps). In searching Wolgemuth's motel room and the car he was riding in, the police found four packs of GPC cigarettes and four of the five bottles of the liquor specified on the list. The list was clearly offered to match the items found in Wolgemuth's possession with the items stolen, and not to explain the officer's subsequent conduct. We conclude the list should have been excluded as improper hearsay.

The State argues that Wolgemuth suffered no prejudice because the list was cumulative to other testimony in the record. However, the club superintendent only mentioned the missing safe in his testimony, and Officer Newgard only testified that he had been informed that "various quantities" of liquor and cigarettes had been stolen without specifying the quantities and name brands. We cannot conclude that the admission of the list did not impact the jury's verdict. We conclude that the list was admitted in error, and therefore we reverse and remand for a new trial.

II. Speedy trial. Wolgemuth also contends that the district court erred in overruling his motion to dismiss for lack of a speedy trial.

We generally review speedy trial questions under Iowa Rule of Criminal Procedure 27(2) for correction of errors at law. *See* Iowa R. App. P. 4; *State v. Smith*, 573 N.W.2d 14, 17 (Iowa 1997). However, we recognize the trial court's discretion to refuse to dismiss within the limits of the exceptions to the speedy trial mandate. *State v. Orte*, 541 N.W.2d 895, 898 (Iowa App. 1995) (citing *State v. Todd*, 468 N.W.2d 462, 470 (Iowa 1991)). Thus, we ultimately look to whether the trial court abused its discretion. *Id.* To the extent that Wolgemuth raises a constitutional claim, our review is de novo. *See State v. Keys*, 535 N.W.2d 783, 786 (Iowa App. 1995).

Iowa Rule of Criminal Procedure 27(2)(b) requires that a defendant be brought to trial within ninety days of indictment, or if charges are brought by trial information, within ninety days of filing of the trial information. *See Smith*, 573 N.W.2d at 17. If trial is not commenced within the ninety-day period, the case must be dismissed unless: (1) the defendant waived his right to a speedy trial; (2) the delay is attributable to the defendant; or (3) there is good cause for the delay. *See Id.*; *State v. Finn*, 469 N.W.2d 692, 694 (Iowa 1991).

When examining the good cause exception, our focus is on one critical factor: the reason for the delay. *See State v. Bond*, 340 N.W.2d 276, 279 (Iowa 1983); *Keys*, 535 N.W.2d at 786. Other factors such as the length of the delay, whether the defendant was prejudiced, and whether the defendant asserted his or her right to a speedy trial also bear on the inquiry when the reason for the delay is weak. *Keys*, 535 N.W.2d at 786. (citations omitted).

A trial information was filed in the present case on July 7, 1997. Trial was originally scheduled to begin on September 3rd. On August 22nd, Wolgemuth filed a motion to suppress. Hearing on the motion was held on September 2nd, and the court ruled on the motion on September 5th. Wolgemuth's trial was continued until October 14th, the next available trial date in that county. The ninety-day period ran on October 5th, and Wolgemuth filed his motion to dismiss on October 13th.

Wolgemuth claims the district court erred in concluding there was good cause for delay because he had filed a motion to suppress and the court needed time to hear and rule on that motion. We disagree. Delay caused by a defendant's filing of pretrial motions which cannot be heard and ruled on before the scheduled trial date may constitute a good cause exception to the speedy trial rule. *See Todd*, 468 N.W.2d at 470; *State v. King*, 225 N.W.2d 337, 340 (Iowa 1975). Wolgemuth filed an untimely motion to suppress. The district court needed adequate time to hear and rule on the motion, which resulted in a continuance of the original trial date. Only fourteen days passed from the filing of the motion until it was ruled on. *See Iowa R. Crim. P. 10(8)* ("A pretrial motion shall be determined without unreasonable delay."). When trial did commence, it was just over a week outside of the ninety-day deadline. Under these circumstances, we conclude the court did not abuse its discretion in finding good cause for the delay.

III. Remaining claims. As we are reversing on other grounds, we need not address Wolgemuth's claim that the trial court was not fair and impartial, although we

find his remaining contentions to be without merit. However, in the event the issue resurfaces in the next trial, we find that the district court did not err in denying Wolgemuth's motion to suppress. There was sufficient probable cause for the traffic stop, therefore the seized evidence could be properly admitted at trial.

Having considered all issues properly before us on appeal, we hereby reverse Wolgemuth's conviction and remand for a new trial.

REVERSED AND REMANDED FOR NEW TRIAL.

No. 98-0115. [9-159] STATE v. WOLGEMUTH

Appeal from the Iowa District Court for Hamilton County, Timothy J. Finn, Judge. **REVERSED AND REMANDED FOR NEW TRIAL.** Heard by Huitink, P.J., and Vogel and Zimmer, JJ. Opinion by Vogel, J. (8 pages \$3.20)

On June 25, 1997, a break-in occurred at the Jewell Golf and Country Club. Danny Wolgemuth was charged and convicted of the third-degree burglary. **OPINION HOLDS: I. Hearsay objections.** At trial, the prosecution asked the investigating officer about a detailed list of the missing items from the country club. Voir dire established that the source of the list was someone other than the deputy, and defense counsel objected on grounds of hearsay and the confrontation clause. However, the trial court ruled that the list was "proper investigation and exception to the hearsay." The State asserts that the list was offered to explain the officer's subsequent actions; however, the scope of this evidence is limited and should not go beyond the point of explaining why certain responsive actions were taken by an officer. In some instances the prejudicial character of specific information linking a defendant with the commission of a crime outweighs the probative value of the evidence thereof. The list in this case contained the specific quantities and name brands of the liquor and cigarettes stolen, and was clearly offered to match the items found in Wolgemuth's possession rather than to explain the officer's subsequent conduct. We conclude the list should have been excluded as improper hearsay. The State alternatively argues that Wolgemuth suffered no prejudice because the list was cumulative to other testimony in the record. However, the club superintendent only mentioned a missing safe in his testimony, and another witness only testified that he had been informed that "various quantities" of liquor and cigarettes had been stolen without specifying the quantities and name brands. We cannot conclude that the admission of the list did not impact the jury's verdict. We find that the list was admitted in error, and therefore we reverse and remand for a new trial. **II. Speedy trial.** Wolgemuth also contends that the district court erred in overruling his motion to dismiss for lack of a speedy trial. However, Wolgemuth filed an untimely motion to suppress and the district court needed adequate time to hear and rule on the motion. This resulted in a continuance of the original trial date, to a date just over a week outside of the ninety-day deadline. Under these circumstances, we conclude the court did not abuse its discretion in finding good cause for the delay.