FILED
FEB 26 1980
CLERK SUPREME COURT



IN THE COURT OF APPEALS OF IOWA

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| STATE OF IOWA | ) | |
| Plaintiff-Appellee, | ) | Filed February 26, 1980 |
| vs. | ) | |
| ELDON H. MANSER, | ) | 351 |
| Defendant-Appellant. | ) | 62819 |

Appeal from Lucas District Court - James Hughes, Judge.

Defendant appeals conviction of O.M.V.U.I., third offense, in violation of section 321.281, The Code 1977, contending trial court erred in reopening case after originally sustaining defendant's motion to dismiss for lack of speedy trial and that trial court erred in overruling defendant's motion to dismiss for failure to take him before a magistrate without unnecessary delay after his arrest. -- Affirmed.

Charles Lavorato, Des Moines, and Frank Watson, Jr., Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, Lona Hansen, Assistant Attorney General, and William L. Shelton, Lucas County Attorney, for plaintiff-appellee.

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

PER CURIAM

Defendant appeals from his conviction for O.M.V.U.I., third offense, in violation of section 321.281, The Code 1977. Defendant contends that the trial court erred in reopening the case to allow the prosecution to present evidence on whether there was good cause for failing to bring defendant to trial within the statutory speedy trial period, after the trial court had originally sustained defendant's motion to dismiss for failure to comply with the speedy trial requirements. Defendant also contends that the trial court erred in overruling his motion to dismiss for failure to take him before a magistrate without unnecessary delay after his arrest. We affirm.

Defendant was arrested on April 5, 1978, and charged with O.M.V.U.I. The next day he was taken before a magistrate, admitted to bail, and ordered to appear for arraignment on May 25, 1978. On May 5, 1978, a trial information was filed charging defendant with O.M.V.U.I., third offense. On May 22, 1978, defendant's arraignment was reset for June 5, 1978. Defendant did not appear on either May 25, 1978, the original arraignment date, or June 5, 1978. A bench warrant was issued for defendant's arrest and he was finally placed in custody on August 4, 1978. Defendant was then arraigned on August 14, 1978. On August 18, 1978, defendant filed a motion to dismiss on the ground that he was not brought to trial within ninety days after the filing of the trial information pursuant to Iowa R. Crim. P. 27(2)(b), and that he was not taken before a magistrate without unnecessary delay pursuant to Iowa R. Crim. P. 2(1) and 1(2)(c). Initially, the State offered no resistance to the motion since the assistant county attorney did not believe the State was prepared to show that due diligence had been used to find defendant after he failed to appear for his arraignment. The trial court then sustained the motion to dismiss and signed a corresponding ruling. However, a few minutes later, the trial court signed a ruling withdrawing the prior ruling that sustained the motion to dismiss and reopened the case to allow the State to present evidence on the exercise of due diligence to find defendant. After the evidence was presented, the trial court overruled defendant's motion to dismiss.

Defendant contends that the trial court's first ruling that sustained the motion to dismiss constituted a final judgment which deprived the trial court of jurisdiction to reopen the case. Since the trial court's ruling sustaining the motion to dismiss was not

entered as a judgment in the official judgment docket, however, it cannot be considered a final judgment. State v. Shilinsky, 248 Iowa 596, 602, 81 N.W.2d 444, 448 (1957). Prior to final judgment, a trial court can correct a prior ruling on a motion. State v. Richards, 229 N.W.2d 229, 232-33 (Iowa 1975). Consequently, in light of the discretion accorded to trial courts in reopening a case to permit the taking of further evidence, State v. Moreland, 201 N.W.2d 713, 714 (Iowa 1972), we cannot conclude that the trial court erred in withdrawing its ruling sustaining defendant's motion to dismiss and reopening the case to permit the State to introduce evidence on the exercise of due dilligence to find defendant.

Regarding the merits of defendant's denial of speedy trial allegation, we conclude that the trial court correctly overruled defendant's motion to dismiss. Defendant failed to appear for his scheduled arraignment. Defendant's contention that he was not notified of the change in arraignment dates is negated by his failure to appear on the originally scheduled date of which he had notice. Failure to appear for arraignment constitutes delay attributable to defendant sufficient to avoid dismissal for failure to bring defendant to trial within the required speedy trial period. State v. Lyles, 225 N.W.2d 124, 126 (Iowa 1975). The trial court found, in response to defendant's contentions, that the State presented sufficient evidence to show due diligence in attempting to find defendant after he failed to appear for his arraignment. Under this record, we cannot conclude that the trial court erred in this finding.

Defendant's contention that the failure to bring him before a magistrate following his August 4 arrest without unreasonable delay constituted grounds for dismissal is without merit. Defendant has not met the requirement of showing any actual prejudice caused by the delay. See United States v. Bandy, 421 F.2d 646, 648 (8th Cir. 1970). Consequently, we affirm the rulings of the trial court.

AFFIRMED.