

IN THE COURT OF APPEALS OF IOWA

No. 4-064 / 93-0705

FILED

MAY 26 1994

CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

ROBERT LEE BATEMAN,

Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County,
Alan L. Pearson, Judge.

The defendant appeals his conviction, following a jury trial, of delivery of a controlled substance in violation of Iowa Code section 204.401(1)(c) (1991). Defendant claims the district court erred in failing to grant his motion to dismiss based on the prosecution's ten-month delay in issuing an arrest warrant. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shari Barron, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Chris Odell, Assistant Attorney General, Fred H. McCaw, County Attorney, and Timothy Gallagher, Assistant County Attorney, for appellee.

Considered by Donielson, C J., and Habhab and Cady, JJ.

HABHAB, J.

The defendant, Robert Bateman, appeals his conviction, following a jury trial, of delivery of a controlled substance in violation of Iowa Code section 204.401(1)(c) (1991). Defendant claims the district court erred in failing to grant his motion to dismiss based on the prosecution's ten-month delay in issuing an arrest warrant. We affirm.

Reginald Jones, a confidential informant for the Drug Task Force, agreed to participate in controlled buys of drugs. In exchange, the State agreed to drop one of three charges of delivery of a controlled substance against Jones and recommend probation. Jones told the police that he knew that his friend, Howard Davis, could buy drugs for him. Bateman and Davis shared a duplex in Dubuque, Iowa.

On November 7, 1991, Agent Robert Battani of the Division of Narcotics, went to the Davis side of the duplex accompanied by Jones. Davis told them to go next door to Bateman's residence. Bateman told them to return to Davis' residence and that he would meet them there. Bateman subsequently appeared at Davis' residence with a plastic bag filled with a white substance that would later be identified as cocaine. Jones gave Bateman \$700. Jones was wearing a police wire at the time of the transaction and the conversation was taped. Bateman admitted the voice on the tape was his.

On August 10, 1992, a warrant was issued for Bateman's arrest. On August 14, 1992, Bateman was charged by trial information with delivery of a controlled substance in violation of Iowa Code section 204.401(1)(c) (1991). On November 3, 1992, Bateman filed a motion to dismiss the charges against him, claiming the ten-month preaccusatorial delay prejudiced his ability to prepare a defense and therefore denied him the right to a fair trial. The district court overruled the motion.

Following a jury trial, Bateman was convicted as charged and sentenced to serve a term of imprisonment not to exceed ten years. Bateman appeals.

Bateman claims the district court erred in denying his motion to dismiss. Bateman claims this delay violated his due process right to a fair trial.¹

When a defendant is alleging error involving a constitutional right, such as here, we make an independent evaluation of the totality of the relevant circumstances to determine if such an error was made. Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975); State v. Jeffries, 417 N.W.2d 237, 239 (Iowa App. 1987). This is the equivalent of de novo review. Barker v. State, 479 N.W.2d 275, 278 (Iowa 1991).

Statutes of limitations provide the primary guarantee against overly stale criminal charges being brought against

1. The defendant does not contend he was denied his right to either a speedy indictment or a speedy trial.

the accused. United States v. Marion, 404 U.S. 307, 322, 92 S. Ct. 455, 464, 30 L. Ed. 2d 468, 479 (1971).² However, the Due Process Clause also has a limited role to play in protecting against oppressive delay. Id. at 324, 92 S. Ct. at 465, 30 L. Ed. 2d at 480-81; United States v. Lovasco, 431 U.S. 783, 789, 97 S. Ct. 2044, 2048, 52 L. Ed. 2d 752, 758 (1977). To prevail in his claim that preaccusatorial delay denied him his due process rights, the defendant must show: (1) the delay was unreasonable, and (2) because of the delay his ability to present his defense was actually prejudiced. State v. Wagner, 410 N.W.2d 207, 210 (Iowa 1987) (citation omitted).

We find Bateman has not established either of these requirements. At the hearing on defendant's motion to dismiss, Detective Parker testified Bateman was part of an ongoing investigation which terminated at the time of his arrest. Detective Parker explained that police department conducted massive drug arrests on a yearly basis to target and discover who may be dealing. He stated the delay was primarily to make additional purchases.³ Bateman argues these reasons are not a sufficient justification for the

2. The ten month period between the commission of the offense and filing of the trial information was well within the three-year statute of limitations for a felony. See Iowa Code § 802.3 (1991).

3. Detective Parker also stated a year-long drug bust let the community know the county attorney's office, the police, and the sheriff's department were doing something about drugs. We give no consideration to this reason as a justification for the delay.

ten-month delay.

The United States Supreme Court and our supreme court both have recognized investigative delay as a valid reason to defer filing of charges. Lovasco, 431 U.S. at 796, 97 S. Ct. at 2051-52, 52 L. Ed. 2d at 763; State v. Williams, 264 N.W.2d 779, 783 (Iowa 1978); State v. Schlick, 257 N.W.2d 59, 61 (Iowa 1977). In addition, there was no evidence in this case the State delayed in order to gain a tactical advantage over Bateman. We will not presume impropriety or bad faith on the part of the State in its delay in bringing charges. State v. Hall, 395 N.W.2d 640, 643 (Iowa 1986) (citation omitted); State v. DeAlegandro, 492 N.W.2d 450, 452 (Iowa App. 1992); see also Wagner, 410 N.W.2d at 210 (defendant cannot prevail on this issue unless he has proved his right to a fair trial was substantially prejudiced as a result of the State's intentional attempt to gain a tactical advantage by delaying the initiation of charges).

Bateman has also failed to show he was prejudiced by the delay. Bateman argues that due to the lapse in time between the transaction and the arrest, he does not remember what he did on November 7, 1991, and therefore he cannot present an alibi defense or a defense of entrapment. Bateman also argues that with further information, he may have been able to raise the defense that he was merely an assistant to the buyer. In a claim

of preaccusatorial delay, a defendant must show more than mere general claims of prejudice to prevail. Hall, 395 N.W.2d at 643. Actual prejudice must be both alleged and proved. Id. (citation omitted). A dimmed memory or a general claim or inability to reconstruct the events of the period does not establish the requisite prejudice. Williams, 264 N.W.2d at 783 (citations omitted); State v. Burrell, 255 N.W.2d 119, 121 (Iowa 1977) (citations omitted).

At the hearing on the motion to dismiss, Bateman asserted he was "pretty sure" he would have had alibi witnesses but for the delay. If the defendant is asserting witnesses are missing as a result of the delay, he must show the witness would have provided material evidence for the defense. Hall, 395 N.W.2d at 643 (citation omitted). Bateman's general assertions are not adequate to show actual prejudice.

We conclude the district court did not err in refusing to grant defendant's motion to dismiss.

AFFIRMED.