

IN THE COURT OF APPEALS OF IOWA

No. 1-162 / 90-30

FILED

JUN 25 1991

CLERK SUPREME COURT

JOHN H. BARKER,

Appellant,

vs.

STATE OF IOWA,

Appellee.

20

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

Barker appeals the denial of postconviction relief. He contends he was denied due process by a delay of over four years between the issuance of an October 1983 arrest warrant for a probation violation and the execution of that warrant in January 1988. **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Brian K. Sissel, Assistant Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Amy M. Anderson, Assistant Attorney General; Fred H. McCaw, County Attorney; and Ralph Potter, Assistant County Attorney, for appellee.

Heard by Donielson, P.J., and Schlegel and Hayden, JJ.

SCHLEGEL, J.

Applicant John R. Barker appeals a district court order denying postconviction relief. Barker contends the four-year delay in executing an arrest warrant denied him due process rights. We agree the delay was unreasonable and, therefore, reverse the order.

In 1982 John Barker was convicted of second-degree burglary and possession of burglary tools in Dubuque County, Iowa. He was sentenced to two concurrent prison terms of up to ten years each. Barker appealed, and this court remanded for resentencing. In April 1983 Barker was resentenced; at that time prison terms were imposed but suspended. Barker was placed on probation for a period of two years.

In September 1983 the Department of Correctional Services filed a report alleging a parole violation for failing to make contact with authorities. On October 26, 1983, the district court issued a warrant for Barker's arrest. On two different occasions, in 1983 and 1985, Iowa officials knew that Barker had been incarcerated in Missouri jails and on the second occasion failed to complete extradition in a timely manner. In 1986 Barker was jailed in Indianola, but Iowa officials made no effort to serve him with the warrant. Finally, in September 1987 Barker was arrested in Coralville, where the warrant was discovered and served. In general, authorities knew Barker was in Joplin, Missouri, and had exchanged telephone calls

with him. The State asserts, however, that Barker was outside the State and had no readily ascertainable home address.

In January 1988 the district court revoked Barker's probation and directed him to serve the prison term imposed. Barker sought postconviction relief to challenge the January 1988 order resentencing him. The district court denied postconviction relief, and Barker has appealed. Barker contends he was denied due process by the delay of over four years between the October 1983 issuance of the arrest warrant and the execution of that warrant in January 1988.

Ordinarily, our review of postconviction relief proceedings is for errors of law. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). When an applicant asserts a violation of constitutional safeguards--such as a violation of due process--we make our own evaluation based on the totality of the circumstances, the equivalent of de novo review. Id.

We find no Iowa case addressing this issue. Numerous federal courts, however, have recognized that, in order to satisfy the demands of due process, authorities must exercise diligence in the issuance and execution of an arrest warrant for an alleged parole violator. See, e.g., United States v. Fisher, 895 F.2d 208, 210 (5th Cir. 1990); United States v. Berry, 814 F.2d 1406, 1410 (9th Cir. 1987); United States v. Strada, 503 F.2d 1081, 1084 (8th

Cir. 1974); Simon v. Moseley, 452 F.2d 306, 309 (10th Cir. 1971); Shelton v. United States Bd. of Parole, 388 F.2d 567, 574 (D.C. Cir. 1967). In Shelton, the court stated:

We think the issuance of a violator warrant triggers a process which, as a matter of fundamental fairness, must be pursued with reasonable diligence and with reasonable dispatch. What will constitute a reasonable time will, of necessity, vary with the facts of each case. Obviously, a violator who has succeeded in evading the authorities is in no position to complain of the delay. Even in other cases delay will not in and of itself suffice to show prejudice, except in an extreme case, and actual prejudice vel non is the focal point of the inquiry.

Id. (footnotes omitted); see Simon, 452 F.2d at 309-10. We find that an unreasonable delay in the execution of an arrest warrant issued for an alleged probation violation may violate a person's right to due process. Whether such a situation exists depends upon the circumstances of the case. See Fisher, 895 F.2d at 210; Simon, 452 F.2d at 309-10. Other factors to be considered include the length of the lapse between issuance and execution of the warrant, the effort made by authorities to serve the warrant, and government conduct frustrating service of the warrant. See Fisher, 895 F.2d at 210. The probationer may be prejudiced when the delay undermines his or her ability to contest the violation or proffer mitigating evidence. Unites States v. Williams, 558 F.2d 224, 226-28 (5th Cir. 1977).

Applying all of these principles to this case, we conclude that the State failed to act with diligence, that the delay was unreasonable, and therefore that Barker's due

process rights were violated. Iowa authorities had all manner of procedures at its disposal to have Barker arrested beyond the borders of the State. The State knew where he was during a great part of the time. Authorities knew on three separate occasions that Barker had been jailed, and on one occasion in Iowa. While a four-year delay may not have been unreasonable per se, it is evident under the facts of this case that the State was dilatory and inept in executing the warrant.

We hold that the State did not act with reasonable diligence demanded by due process. We therefore reverse the order denying postconviction relief. We remand to the district court for granting of appropriate relief.

REVERSED AND REMANDED.

Hayden, J., concurs; Donielson, P.J., dissents.

DONIELSON, P.J. (dissenting)

I respectfully dissent. I agree that in some circumstances an unreasonable delay in the execution of an arrest warrant can violate a person's right to due process. However, as the majority points out, whether such a situation exists depends upon the circumstances of the case, including whether the applicant has demonstrated prejudice by the delay.

I do not find that Barker's right to due process was violated in this case. First, Iowa has no authoritative control over the execution of its warrants after they have been issued if the person sought is outside the territorial boundaries of the state. Barker was outside Iowa for much of the time after the issuance of the warrant; it was beyond Iowa's authority to control the amount of effort put into taking Barker into custody. Furthermore, Iowa did attempt extradition proceedings. I believe the majority's characterization that the State was "dilatory and inept" is unfair. The record tells us only that the extradition attempt was untimely; it does not reveal the reason for the untimeliness.

Additionally, Barker had actual notice of the allegations of probation violation, as well as the existence of the warrant from the time of its issuance. It was within his power to return to Iowa and mount any defense or rebuttal to the charges he may have cared to make. Instead, Barker informed his probation officer he

would not return to Iowa unless the warrant was quashed. Barker gave his mother's address as his home address to Missouri authorities. However, when checked, Barker's mother informed authorities that he was not living there. For the next few years, Barker was highly mobile and difficult to locate, included in this time Barker was arrested in four states. Barker contends it was fundamentally unfair that "the warrant was held over his head for five years before the State's execution." I find such a statement ironic under the circumstances. The majority permits the player, Barker, to win the game. I wouldn't do that!

Lastly, Barker has neither argued nor established that he experienced actual prejudice by the delay in executing the arrest warrant. Barker was not undermined in his ability to contest the violation or in his ability to proffer mitigating evidence. I find no violation of due process occurred in the delay.

I would affirm the district court's denial of postconviction relief.