

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
	)	
Petitioner,	)	Filed May 31, 1979
	)	
vs.	)	
	)	
WILLIAM R. EADS, JUDGE IN AND FOR	)	129
JOHNSON COUNTY and the SIXTH JUDICIAL	)	<u>2-62250</u>
DISTRICT OF IOWA,	)	
	)	
Respondent.	)	

Certiorari to Johnson District Court - William R. Eads, Judge.

State brings an action in certiorari, challenging the trial court's grant of defendant's motion for a new trial on the basis of newly discovered evidence. - Writ sustained and case remanded for judgment and sentencing.

Kristin J. Hibbs, Assistant Johnson County Attorney, for Petitioner.

Gerald J. Kucera & Francis J. Pruss, Cedar Rapids, for Respondent.

Heard by Oxberger, C. J., and Donielson, Snell and Johnson, JJ. Carter, J., takes no part.

SNELL, J.

The State brings this certiorari action, asserting that the trial court acted illegally in granting defendant's motion for a new trial based on newly discovered evidence. The defendant, Jay Michael Hayen, was tried before a jury and found guilty of assault with intent to commit rape in violation of section 698.4, The Code 1977. We reverse.

I. A court issuing a writ of certiorari has a responsibility to determine whether the writ is allowable even though the parties themselves do not question its propriety. State v. Ganton, 231 N.W.2d 31, 33 (Iowa 1975). Here we question whether the State should have filed a direct appeal and, if so, whether this certiorari action should be dismissed. Resolution of this question depends upon whether it was mandatory that the State, in seeking review, proceed under the new code. This crime was committed and trial was held in 1977, before the new criminal code took effect. The trial judge, in ruling upon defendant's posttrial motions, stated that he would, since defendant requested it, proceed under the new criminal code. But, in his amended motion for new trial, which is the motion appealed from in this case, defendant did not request application of the new criminal code, nor did the trial court state whether it was proceeding under it. The new criminal code provides that the State has a right of appeal from an order granting a new trial. § 814.5(1)(c), Supplement to the Code 1977. Under the old code, however, an appeal in a criminal case could only be taken from final judgment. § 793.2, The Code 1977. In a criminal case, sentence constitutes final judgment. State v. Anderson, 246 N.W.2d 277, 279 (Iowa 1976); State v. Farmer, 234 N.W.2d 89, 90 (Iowa 1975); State v. Coughlin, 200 N.W.2d 525, 526 (Iowa 1972). However, section 793.2, governing appeals in criminal cases, does not apply to proceedings in certiorari. Anderson, 246 N.W.2d at 279; State v. Anderson, 245 Iowa 99, 102, 60 N.W.2d at 794, 796 (1953).

We find that since the crime occurred and trial was held before the new criminal code took effect, the State properly proceeded under the old code in seeking review. We further find that under the 1977 Code, a certiorari action may be used to challenge the legality of a grant of a new trial in a criminal case where judgment is not final. See Steinbeck v. Iowa Dist. Court In and For Linn County, 224 N.W.2d 469, 472 (Iowa 1974);

State v. Holliday, 169 N.W.2d 768, 770-71 (Iowa 1969).

The primary importance in determining the proper mode of review is the standard of review that is then applied by an appellate court. When a party directly appeals from a grant of a motion for new trial, a reviewing court will not interfere with the trial court's ruling unless it is reasonably clear the trial court abused its broad discretion. Iowa R. App. P. 14(f)(3) and (4); Waddell v. Peet's Feeds, Inc., 266 N.W.2d 29, 31 (Iowa 1978); State v. Overstreet, 243 N.W.2d 880, 886 (Iowa 1976). When a party challenges the legality of a court's action by means of certiorari, illegality within the certiorari rule is found when substantial evidence does not exist to support the findings on which the lower court based its conclusion of law. Collier, 247 N.W.2d at 238; State v. Cullison, 227 N.W.2d 121, 126 (Iowa 1975). Findings are supported by substantial evidence if reasonable minds would accept them as adequate to reach a conclusion. City of Davenport v. Pub. Employment Relations Bd., 264 N.W.2d 307, 311 (Iowa 1978). This latter standard is applied here.

II. Thus, it may be said that the State, in asserting that the trial court acted illegally in granting defendant's motion for a new trial based on newly discovered evidence, essentially claims that substantial evidence did not exist to support the findings on which the trial court based its conclusions of law. In order to prevail on a motion for a new trial based on newly discovered evidence, the defendant must establish that 1) the evidence was discovered after trial and before judgment, 2) that the evidence could not have been discovered before the conclusion of trial in the exercise of due diligence, 3) that the evidence is material to the issue and not merely cumulative or impeaching, and 4) that the evidence will probably change the result if a new trial is granted. Overstreet, 243 N.W.2d at 886; State v. Sims, 239 N.W.2d 550, 554 (Iowa 1976). Here defendant's newly discovered evidence consisted of the subsequent arrest of another man, Donovan Sanders, for the crime of assault with intent to commit rape. The trial court granted defendant's motion primarily because Sanders also fit the original description supplied by the victim, Barbara Wilmarth, of her assailant; in a few respects, Sanders better fit the description than did the defendant. Also Sanders lived in the same area as defendant and in the same vicinity in which this crime was committed. Further, the assault with which Sanders was charged was committed in a

fashion somewhat similar to the assault defendant was found guilty of. The trial court also considered that even though the victim positively identified Hayen as her assailant, she was initially hesitant in choosing his photograph.

The State does not challenge the facts that the evidence was discovered after trial and could not have been discovered before then. But the State does argue that defendant failed to show how the evidence of Sanders' arrest materially affects the issue of Hayen's guilt or innocence and failed to prove that this new evidence would probably change the results of the trial. We agree with the State. No evidence was presented to indicate that Sanders was in any way connected with this case or that police suspected that any person other than the defendant committed this crime. Evidence that another person resembling a description of this defendant and committing the same type of crime does not substantially support a finding that the evidence is material.

Furthermore, the victim's positive identification of defendant as her assailant, both by looking at him and listening to his voice, makes it probable that the result upon retrial would be the same as in this case. Information about inconsistencies in her original description in relation to the defendant and about her initial hesitation in identifying defendant were brought out at trial. The fact that Sanders might in some respects better fit this description is not enough to make it likely, in view of the victim's positive identification, that another result would occur on retrial.

Thus we conclude respondent judge acted illegally in granting defendant a new trial. The writ is sustained and the case is remanded for judgment and sentencing in accordance with this opinion.

WRIT SUSTAINED AND CASE REMANDED.

All judges concur, except Oxberger, C. J., who dissents.

OXDERGER, C. J. (dissenting)

I dissent. When ruling on a motion for new trial, the trial court's exercise of judgment is not performed in a vacuum. Here, the judge who considered the motion also presided at the jury trial. His first-hand observation of the witnesses placed him in a better position to gauge the quality of the State's evidence. He was thus in a superior position to determine the impact of the "Sanders" evidence on the outcome of a re-trial. I would annul the writ and affirm the trial court's ruling.