FILED
AUG 29 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	166
Plaintiff-Appellant,	)	Filed August 29, 1985
vs.	)	5-334 84-1482
MICHAEL LARRY FRYE,	)	
Defendant-Appellee.	)	

Appeal from the Iowa District Court for Marshall County - Carl D. Baker, Judge.

The state appeals the dismissal of a trial information charging defendant with burglary in the second degree. AFFIRMED.

Phillip L. Krejci, County Attorney, for plaintiff-appellant on the brief and Thomas J. Miller, Attorney General, and Roxann M. Ryan, Assistant Attorney General, for plaintiff-appellant in further proceedings.

Charles King, of Haupert, Robertson & King, Marshalltown, for defendant—appellee.

Considered by Donielson, P.J., and Schlegel, and Sackett, JJ.

SACKETT, J.

Defendant Michael Frye was charged with burglary in the second degree by an information incorporating minutes listing five expected witnesses. It was stated with regard to two of the witnesses that they would testify "in accord with attached reports" consisting of an investigating police officer's account of things they had said and done during the course of the investigation. Upon Frye's motion and after depositions had been taken, the trial court found the minutes to be defective and dismissed the information pursuant to Iowa Rule of Criminal Procedure 10(6)(c)(2). The state did not appeal from this order, which also provided that pursuant to Rule 10(7) Frye's bail was to continue for a period of twenty days pending the filing of a new information. Upon Frye's motion, the trial court dismissed under Rule 10(7) a second information filed more than twenty days after dismissal of the first.

The state has appealed contending: (1) that the dismissal of a previously filed information pursuant to Iowa Rule of Criminal Procedure 10(6) was erroneous and therefore insufficient to trigger provisions of Rule 10(7); and (2) the twenty-day limitation period of Rule 10(7) should be determined to be applicable only to the period within which a defendant's liberty may be restrained rather than the period within which a new information must be filed following a dismissal under Rule 10(c).

I.

WAS THE DISMISSAL OF THE PREVIOUS INFORMATION ERRONEOUS

In the earlier order not under appeal, the trial court held:

> . . . The Minutes of Evidence attached to this information do not comply with the Rule; and in accordance with Rule 10(6)(c)(2) is subject to a Motion to Dismiss.

The state now seeks to argue the trial court was not correct in that ruling and

alleges the trial court erroneously dismissed under Iowa Rule of Criminal Procedure 10(6)(c)(2).

The trial court made a determination that the cause should be dismissed in accordance with Rule 10(6)(c)(2) and the charge was dismissed. A dismissal under Rule 10(6)(c)(2) is a discretionary ruling subject to appeal. No appeal was taken from that ruling. The correctness of the trial court's ruling that the cause be dismissed under Rule 10(6)(c)(2) is not before us.

II.

IS IOWA RULE OF CRIMINAL PROCEDURE 10(7) APPLICABLE ONLY WHEN THE DEFENDANT'S LIBERTY IS RESTRAINED

In State v. Lee, 298 N.W.2d 332, 334 (Iowa 1980) the state made the argument that Iowa Rule of Criminal Procedure 10(7) should be limited to those situations in which a defendant is in custody or bail is continued when an indictment is quashed. In Lee, the court held:

> The Rule 10(7) time limitation shall apply in all instances where dismissal is ordered for a reason set forth in Rule 10(6), whether or not the court orders bail continued or defendant held in custody pending filing of a new information or indictment.

Id. at 334.

We affirm the trial court.

III.

The state, through appellant, filed a brief with a red cover. The state's attention is called to Iowa Rule of Appellate Procedure 16(b) which provides with reference to forms of brief in part as follows:

> If briefs are produced by commercial printing or duplicating firms, or, if produced otherwise and colored covers are available, the cover of the brief of the appellant shall be blue; . . . [emphasis added]

AFFIRMED.