FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed August 26, 1980
vs.	)	
KIRBY JOE GAINES,	)	0-150 62884
Defendant-Appellant.	)	

Appeal from Cass District Court - E. F. Hanson, Judge.

Defendant appeals conviction of second degree arson and second degree burglary in violation of sections 712.3 and 713.3, supplement to the Code 1977. AFFIRMED.

Harold G. DeKay, Atlantic, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, Douglas Staskal, Assistant Attorney General, Ray Yarham, Cass County Attorney, and John Otto, Assistant Cass County Attorney, for plaintiff-appellee.

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

Defendant, Kirby Joe Gaines, appeals conviction of second degree arson and second degree burglary in violation of sections 712.3 and 713.3, supplement to the Code 1977. On this appeal, defendant asserts the following as grounds for reversal: The trial information should have been dismissed because the Assistant County Attorney lacked statutory authority to file it; the court erred in not granting motions for directed verdicts of acquittal; the trial court erred in admitting certain exhibits into evidence; the court erred in including in its findings testimony given only at the suppression hearing; the court should have dismissed the information on its own motion pursuant to Iowa R. Crim. P. 27(2)(b); and the court erred in overruling his motion to suppress the evidence seized pursuant to two search warrants. We affirm the conviction.

I.

On July 17, 1978, the Assistant County Attorney of Cass County filed a trial information charging defendant with first degree burglary and second degree arson in connection with the burglary and burning of the Elks Club during the early morning hours of July 13, 1978. Trial to the court began November 14, 1978, and on November 22 the court found defendant guilty of second degree burglary and second degree arson. On December 18, 1978, defendant was sentenced to two ten-year terms to run concurrently; defendant filed a notice of appeal later that same day.

The evidence presented at trial indicated defendant had told a friend he had burglarized and burned the Elks Club. Additionally, several items stolen from the Club were found in a search of the home of defendant's father, where the defendant usually lived; some of the items were found in the bedroom usually occupied by the defendant. Defense counsel made numerous motions, both before and at trial. At a suppression hearing prior to trial, defendant filed a motion to dismiss pursuant to Iowa R. Crim. P. 10(6)(c)(2), contending the Assistant County Attorney lacked statutory authority to file the information against him. He also moved to suppress evidence seized pursuant to warrant from his father's house and from the house of a friend. The trial court overruled both motions. At trial, defendant voiced various objections, most of which were overruled, to admission of the State's exhibits into evidence. Defendant also moved for directed verdicts of acquittal at the close of the State's evidence and at the close of all the evidence; the trial court overruled both motions.

II.

As grounds for reversal, defendant first alleges the trial information should have been dismissed because the Assistant County Attorney lacked authority under Iowa law to file it. We reject defendant's argument.

The trial information was filed by the Assistant County Attorney for Cass County on July 17, 1978. At that time, Iowa law provided "[t]he county attorney shall have the sole authority to file such a trial information unless that authority is specifically granted to other prosecuting attorneys by statute." Iowa R. Crim. P. 5(1). Defendant contends that unless otherwise provided by statute this provision precludes the filing of trial informations by anyone but the county attorney, and since the information against the defendant was not filed by the county attorney, it was filed without statutory authority and should have been dismissed. However, at the time the information was filed, Iowa law also provided the term "county attorney" included authorized assistants of the county attorney unless otherwise required by the context of the statute. § 801.4(3), supplement to the Code 1977. This provision therefore includes assistant county attorneys within the term "county attorney" and grants them statutory authority to file trial informations. We agree with the trial court on this point.

III.

Defendant next contends the trial court erred in overruling his motions for directed verdicts of acquittal. We are not persuaded by this argument.

The verdict in the instant case was based entirely on circumstantial evidence, since no witness saw the defendant commit the arson or burglary. Defendant relies on State v. Sigman, 220 Iowa 146, 261 N.W. 538 (1935), for the proposition that "[i]n order to convict upon circumstantial evidence, it is necessary to show that all of the circumstances shown are inconsistent with other rational theory of innocence." Id. at 149, 261 N.W. at 539. See also State v. McDaniel, 265 N.W.2d 917, 924 (Iowa 1978); State v. Overstreet, 243 N.W.2d 880, 884 (Iowa 1976). Although the Iowa Supreme Court recently abandoned the Sigman standard in State v. O'Connell, 275 N.W.2d 197, 205 (Iowa 1979) ("For purposes of proving guilt beyond a reasonable doubt, direct and circumstantial evidence are equally probative."), it was the applicable standard at the time defendant's case was tried in 1978. At any rate, Sigman provides criteria to guide trial courts in ruling on motions for directed verdicts. It does not provide the standard this court will use to review such rulings.

In reviewing the trial court's decision to overrule defendant's motions for directed verdicts, this court will evaluate the evidence in the light most favorable to the State, State v. Howard, 284 N.W.2d 201, 203 (Iowa 1979); State v. Jones, 281 N.W.2d 13, 18 (Iowa 1979), to determine whether a reasonable person could find guilt beyond a reasonable doubt, State v. Holderness, 293 N.W.2d 226, 235 (Iowa 1980). The court will make every legitimate inference that may be fairly and reasonably drawn from the State's evidence. Howard, 284 N.W.2d at 203; State v. Fryer, 243 N.W.2d 1, 8 (Iowa 1976). Only evidence tending to support the conviction will be considered on review. Howard, 284 N.W.2d at 203; State v. White, 223 N.W.2d 163, 164 (Iowa 1974).

With these principles in mind, we examine the evidence upon which the trial court based its decision to overrule defendant's motion for a directed verdict. The trial court heard a friend of the defendant testify not only that defendant admitted burglarizing and burning the Club, but that the defendant also had described in some detail how the fire had started. The trial court had before it evidence that items missing from the Club following the fire were found in and around the house of defendant's father where defendant usually stayed, and in the bedroom usually used by defendant. The liquor bottles found in the house were the same brand and bore the same State of Iowa stamps as those bottles sold to the Club before the fire. The fact the bottles were found in the house unbroken suggests whoever put them there stole them from the Club, since, in compliance with the law, the Club's bar employees systematically broke liquor bottles when they became empty. Marks made by a tire iron found in the garage of defendant's father corresponded to those marks found on doors forced open at the Club. In short, we conclude sufficient circumstantial evidence existed to support the trial court's refusal to grant defendant's motion for directed verdicts.

IV.

Defendant further contends the trial court erred in admitting into evidence two reports from the Iowa Bureau of Criminal Investigation Crime Laboratory, as well as the physical evidence that was the subject of those reports. Specifically, defendant objects to the admission of the lab reports and the physical evidence on the grounds they are irrelevant and their admission into evidence deprives him of his right to cross-examine adverse witnesses. Additionally, he asserts it was error to admit the lab reports because they contained hearsay and their authors were not duly qualified as experts. Finally, he objects to admission of the items of physical evidence because a

sufficient chain of custody was not established with respect to them. Examination of Iowa law will demonstrate the inadequacy of each of defendant's arguments.

In Iowa a report from the State Crime Laboratory may be admitted into evidence with the same force and effect as if the author of the report had testified in person. § 691.2, The Code 1979 (prior law at § 749A.2, The Code 1977). The statute creates a presumption of expertise on the part of the author of the lab report. Id. In the interest of preserving evidence in its original condition, the Commissioner of Public Safety is authorized to make rules governing the handling of items of evidence during the time they are in the possession of the lab. § 691.3, The Code 1979 (prior law at § 749A.3, The Code 1977). If an item is handled in conformity with those rules and is properly delivered to the laboratory, chain of custody problems are alleviated. State v. Smith, 272 N.W.2d 859, 863 (Iowa 1978).

In the instant case, the physical evidence was dealt with in conformity with the chain of custody rules and was correctly admitted into evidence by the trial court. Smith specifically requires the State to show:

> 1) that the proper specimen was either delivered directly to the laboratory or deposited in the mail, properly addressed to the laboratory (including the proper section code); and
>
> 2) that the commissioner's rules regarding the handling of that specimen after such delivery or receipt by mail were met. This part may be shown by reliance on the technician's report itself.

Id. In the case at hand, the physical evidence was delivered directly to the lab by the police and both lab reports stated the items analyzed were handled in accordance with the Commissioner's rules.

With respect to the lab reports themselves, defendant cannot prevail with his argument they contain hearsay since the statute has been held to authorize the admission of otherwise inadmissible hearsay. State v. Dykers, 239 N.W.2d 855, 857 (Iowa 1976); State v. One Certain Conveyance, 1971 Honda 350, Etc., 211 N.W.2d 297, 301 (Iowa 1973) (both decisions interpreting § 749A.2, The Code 1977, which is identical to § 691.2, The Code 1979). Nor can defendant maintain the authors of the reports were unqualified as experts, since the statute creates a presumption of expertise, § 691.2, The Code 1979, and he had the opportunity to rebut that presumption by cross-examining the authors of the reports, who testified in person.

Finally, defendant contends the lab reports and the physical evidence are not relevant to this case and admitting them into evidence deprives him of his right to cross-examine. The latter argument was rejected in State v. Davison, 245 N.W.2d 321, 323 (Iowa 1976), and State v. Kramer, 231 N.W.2d 874, 880 (Iowa 1975) (both interpreting § 749A.2, The Code 1977). Furthermore, since relevance is determined by the extent to which the offered evidence makes the desired inference more probable than it would be without it, McCormick's Handbook of the Law of Evidence § 185, at 437 (2d ed. E. Cleary 1972), we cannot accept defendant's challenge to the relevancy of this evidence.

In conclusion, we find no error as to the admissibility of the lab reports and the physical evidence analyzed therein.

V.

Defendant also alleges the trial court erred by including in its findings evidence that had been presented only at the suppression hearing. We disagree.

First, although defendant's brief is unclear as to what evidence he would bring to this court's attention, we surmise his complaint focuses on the suppression hearing testimony of Officer Robert Clem of the Atlantic Police Department. Clem testified to events surrounding the capture of the defendant at the apartment of James Headlee, a friend of the defendant, and the discovery at that time of a liquor bottle that according to Headlee the defendant had previously identified as his own. Clem did not testify at trial and the trial court included in its findings a reference to the incident at Headlee's apartment.

If the defendant means to suggest the only testimony about these events was at the suppression hearing, he is mistaken. James Headlee's trial testimony was substantially the same as Officer Clem's testimony at the suppression hearing. There is nothing to suggest the court based its finding on Clem's testimony rather than on Headlee's.

Furthermore, defendant has presented no authority in support of his assignment of error and in fact none appears to exist. He does cite State v. Sanders, 282 N.W.2d 770 (Iowa Ct. App. 1979), which stands for the proposition that a defendant's fifth amendment privilege against self-incrimination is not violated by requiring him to assert a possessory or proprietary interest in items seized at a suppression hearing in order to obtain standing. It is obvious in this context defendant's reliance on Sanders is inapposite.

Furthermore, if defendant's complaint here stems from a concern the procedural safeguards of trial were lacking at the suppression hearing, that concern is unjustified in this case. At the suppression hearing, defendant was present and represented by counsel, who had a complete and adequate opportunity to cross-examine Officer Clem, who was under oath and whose demeanor could be readily observed by the fact-finder.

We decline to offer further speculations on defendant's grounds for objecting to the possibility the trial court based its findings in part or in whole on Clem's suppression hearing testimony. Accordingly, we hold that the trial court committed no error on this issue.

VI.

Defendant also claims as grounds for reversal the trial court erred by failing to dismiss the trial information on its own motion pursuant to Iowa R. Crim. P. 27(2)(b) when defendant was not brought to trial within the amount of time set forth by the rule. We are unconvinced by defendant's argument.

Iowa R. Crim. P. 27(2) provides in pertinent part:

> It is the public policy of the state of Iowa that criminal prosecutions be concluded at the earliest possible time consistent with a fair trial to both parties. Applications for dismissal under this subsection may be made by the county attorney or the defendant or by the court on its own motion.
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> . . . .
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> (b) If a defendant indicted for a public offense has not waived his right to a speedy trial he must be brought to trial within 90 days after indictment is found or the court must order the indictment to be dismissed unless good cause to the contrary be shown.

The term "indictment" includes trial informations. Iowa R. Crim. P. 5(5).

Defendant argues dismissal based on denial of speedy trial is automatic if the accused is not brought to trial within ninety days. This position is without merit. A provision requiring automatic dismissal would be inconsistent with the well-recognized proposition a defendant waives his right to receive dismissal for denial of speedy trial by failing to move for dismissal until after a verdict has been rendered. State v. O'Connell, 275 N.W.2d 197, 200 (Iowa 1979); State v. Paulsen, 265 N.W.2d 581, 585 (Iowa 1978); Foster v. Brewer, 197 N.W.2d 366, 367 (Iowa 1972); State v. Allnutt, 261 Iowa 897, 905, 156 N.W.2d 266, 270 (1968). It makes no sense to say a right may be waived if its vindication by the trial court in all cases is to be automatic. Furthermore, if the court

must automatically dismiss the information when the defendant has been denied a speedy trial, the provision in Iowa R. Crim. P. 27(2) that the prosecutor, the defendant, or the court on its own motion may move to dismiss for denial of speedy trial is meaningless. The filing of a motion to dismiss for lack of a speedy trial serves no purpose if the court must automatically dismiss the information after ninety days.

For these reasons, we hold Iowa R. Crim. P. 27(2)(b) is more reasonably read to mean if the trial is not commenced within the ninety-day period the case must be dismissed unless one of three things has occurred: The defendant has waived his right to a speedy trial; the delay is attributable to the defendant; or there is good cause for the delay. State v. Petersen, 288 N.W.2d 332, 335 (Iowa 1980). In the case of a defendant who fails to move to dismiss for lack of a speedy trial until after a verdict has been returned, waiver is usually found. State v. Paulsen, 265 N.W.2d 581, 585 (Iowa 1978) (applying section 795.2, The Code 1975, predecessor to Iowa R. Crim. P. 27(2)). However, if defendant fails to make this motion and is not being represented by counsel and not being admitted to bail, waiver may or may not be found. Id. This would be the situation where dismissal on the court's own motion would be appropriate. Here, defendant failed to make the proper motion. The court properly refused to dismiss this case on its own motion as defendant was represented by counsel from at least the time of the arraignment and was admitted to bail.

VII.

Finally we hold the defendant has failed to preserve error on the issue of whether the trial court erred in overruling his motion to suppress evidence obtained pursuant to two search warrants. Defendant's discussion of this issue consists of a citation to a case involving a warrantless search, State v. Schrier, 283 N.W.2d 338 (Iowa 1979), followed by two incomplete sentences: "[t]he motion to suppress the evidence found in Headlee's house and car" and "[t]he motion to suppress the evidence obtained at the Gaines' residence." Defendant has failed to present even a semblance of argument, see Iowa R. App. P. 14(a)(5), and we are entitled to disregard an assignment of error so vague and indefinite as to be essentially meaningless. State v. Marcum, 245 Iowa 396, 400-01, 62 N.W.2d 238, 240 (1954).

AFFIRMED.