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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Appellee,) Filed August 31, 1978
vs.)
RONALD K. BEASTON,) 538 / 60627
Appellant.)

Appeal from Dubuque District Court - Karl Kenline, Judge.

Defendant appeals from conviction of the crime of robbery with aggravation alleging lack of speedy trial, errors in instructions and admission of his confession in violation of his constitutional rights. - Affirmed.

Stephen S. Scott, Dubuque, for Appellant.

Richard C. Turner, Attorney General of Iowa, J. Susan Carney, Assistant Attorney General, and Robert J. Curnan, Dubuque County Attorney, for Appellee.

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

PER CURIAM

Defendant Ronald K. Beaston appeals his conviction of the crime of robbery with aggravation in violation of § 711.2, The Code. On appeal, defendant alleges the trial court erred in overruling his motion to dismiss for lack of a speedy trial. Defendant also asserts errors in instructions and in admitting into evidence a written confession he claims was the product of long hours of interrogation, after he indicated he did not want to talk, and an offer of a lesser charge, all of which was in violation of his Miranda rights.

Defendant's principal complaint is that the trial court erred in not finding he was denied his constitutional and statutory right to a speedy trial. Section 795.2, The Code, requires a defendant be brought to trial within 60 days after indictment, or as in the instant case arraignment, otherwise the court must order the indictment dismissed. The three exceptions to § 795.2 are defendant's waiver of the right of speedy trial, the delay is attributable to the defendant or the State shows good cause for the postponement of defendant's trial beyond the 60 day time limit. State v. Leonard, 240 N.W.2d 690, 691 (Iowa 1976).

The evidence is clear defendant specifically exercised his speedy trial right and that he made a timely motion to dismiss for failure to afford him a speedy trial, as mandated by State v. Myers, 215 N.W.2d 262, 264 (Iowa 1974). Leonard, supra. We must only decide if either of the remaining two alternatives was established by the State.

The information was filed on August 17, 1976, while defendant was incarcerated in Joliet, Illinois on another charge. On October 19, 1976, defendant was returned to the State of Iowa. Defendant was formally arraigned on October 22nd, at which time he plead not guilty and demanded speedy trial. All parties agree that the 60 day limit expired December 21, 1976. Defendant's motion to dismiss was filed January 5, 1977, overruled on January 7th, and trial commenced on January 10, 1977, or approximately 19 days over the terminal date.

Delay Attributable to Defendant. On November 8, 1976, defendant wrote a letter to the trial court requesting a change in court appointed counsel. Defendant was advised on how to proceed on November 12th and on November 22, 1976, a

hearing was held on defendant's request. Although defendant decided to retain his court appointed attorney, this 14 day delay is nevertheless attributable to him. See, e.g., State v. Donnell, 239 N.W.2d 575, 578-9 (Iowa 1976). Defendant is also chargeable with the delay in bringing him to trial from the time of filing of his motion to dismiss (January 5, 1977) to the time of ruling thereon (January 7) or two days. State v. Palimore, 246 N.W.2d 295, 298 (Iowa 1976).

Good Cause. A pretrial conference on November 23rd scheduled an in camera hearing for December 10, 1976, to determine the admissibility of defendant's confession and admissions. On that same date, trial was scheduled for December 14, 1976, one week within the 60 day limit. On December 10, the hearing was continued until December 17 because of the State's inability to secure an out-of-state witness to the taking of the confession. Defendant's confession was ruled admissible on December 20, 1976 and the trial scheduled for January 10, 1977.

Although the record does not reflect which party requested the in camera hearing, the State argues and the trial court found good cause existed for the delay. Initially, we note our review is not de novo and the trial court's decision on conflicting evidence is controlling. To secure a reversal, defendant must show the trial court abused its limited discretion. State v. LaPlant, 244 N.W.2d 240, 242 (Iowa 1976); Donnell, supra. Where the determination of the trial court is supported by substantial evidence in the record, we must affirm. State v. Reynolds, 250 N.W.2d 434, 437 (Iowa 1977).

The trial court found an interim delay of 27 days from the date of the pretrial until December 20th, the date the confession was ruled admissible. The court found the delay was for good cause. We disagree. We find nothing which supports a determination that delay from the date of the pretrial to the date of ruling on a subsequent inquiry constitutes good cause. However, we find the delay from December 10th, the date of the original in camera hearing, to December 20, the date the confession was held admissible, constitutes good cause. Specifically, we find the period from December 10th to December 17th, when the hearing was continued due to an unavailable witness, constitutes good cause for the delay. There is no evidence that this delay was for other than good cause. Further, we

find the three day delay from the hearing on December 17th to the ruling on December 20th constitutes good cause. See State v. Truax, 232 N.W.2d 861, 863 (Iowa 1975).

Our inquiry discloses delays of 14, two and ten days or a total of 26 days delay for good cause. Defendant's trial commenced 19 days beyond the 60 day limit limit contained in § 795.2. Defendant has failed to show the trial court abused its

Defendant's second complaint concerns a failure of the trial court to instruct that where the defendant aids and abets another in the perpetration of a robbery with aggravation, it is necessary that defendant know the actual perpetrator had the intent, if resisted, to kill or maim. Section 688.1, The Code, requires that all persons, whether they directly commit the act or aid and abet its commission, be tried and punished as principals.

"To aid or abet means to assent to an act or to lend countenance or approval either by active participation in it or by some manner encouraging it." State v. Watson, 242 N.W.2d 702, 706 (Iowa 1976). "However, when intent is an element of the crime charged, a person may be convicted on a theory of aiding and abetting if he participates either with the requisite intent himself or with knowledge that the principal possesses the required intent." State v. Lott, 255 N.W.2d 105, 109 (Iowa 1977) (emphasis added).

In the instant case the crime of robbery with aggravation has a specific intent element. If the evidence was sufficient, defendant could be convicted of the crime either under the theory that he had the requisite intent himself or that he knew the principal had the requisite intent. Lott, supra. The trial court instructed only as to defendant's being armed with a dangerous weapon with intent. The instruction was more favorable to defendant than required under the law. There was no prejudice to defendant in the denial of the requested instruction.

Defendant's third contention concerns the trial court's refusal to instruct that a robbery involving a dangerous weapon is not necessarily, although it may be, robbery with aggravation. The instructions given comply with those approved in State v. Poffenbarger, 249 Iowa 480, 482-3, 87 N.W.2d 441 (1958). They also

contained the same points contained in the requested instruction, though in a different form. A requested instruction may be properly refused if the point raised is otherwise substantially covered. State v. Tensley, 249 N.W.2d 659, 662 (Iowa 1977). We find no error.

Defendant's final complaint concerns the admissibility of a written confession and other incriminating statements made after long hours of questioning which defendant argues was in violation of Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 16 L. Ed. 2d 694 (1966). Since this assignment of error presents federal constitutional issues, we make an independent evaluation of the totality of the circumstances from which the assertion of unconstitutionality arises. We review the evidence de novo. State v. Russell, 261 N.W.2d 490, 492 (Iowa 1978); State v. Snethen, 245 N.W.2d 308, 311 (Iowa 1976); State v. Conner, 241 N.W.2d 447, 453 (Iowa 1976).

An individual may waive his constitutional rights. State v. Hilpipre, 242 N.W.2d 306, 309 (Iowa 1976); State v. Fetters, 202 N.W.2d 84, 89 (Iowa 1972). However, it is incumbent upon the State to prove by a preponderance of the evidence such waiver was knowingly, voluntarily and intelligently made. Russell, supra; Hilpipre, supra at 311. See also State v. Cooper, 217 N.W.2d 589, 597 (Iowa 1974).

Our de novo review of the evidence convinces us that defendant's waiver of his constitutional rights was both voluntarily and intelligently done. The record is clear that defendant was repeatedly advised of his Miranda rights and when he chose to be silent, his wishes were respected. Although defendant was questioned intermittently over an approximate twelve hour period, much of that time he refused to talk and the matter was dropped. Cf. State v. Moon, 183 N.W.2d 644 (Iowa 1971). Further, he left the police station about 3:00 p.m. and was not arrested and questioned again until 4:30 p.m. the same day. It was only after defendant's confederate was arrested and agreed to talk that defendant finally gave in. Although a promise of leniency was made, it was dropped before defendant confessed and he was aware of the revocation. Cf. State v. Hilpipre, supra. All subsequent discussions after an initial reluctance to talk or other expression of a desire to remain silent are not prohibited. See State v. McClelland, 164 N.W.2d 189, 196 (Iowa 1969). Defendant's conviction is affirmed.

AFFIRMED.

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

OXBERGER, J. (dissenting)

I dissent. Under State v. Lybarger, 263 N.W.2d 545, 546 (Iowa 1978), it is the State, not defendant Beaston, who had to see that the prosecution is timely and that trial was afforded within the allowable period of time. I find after arraignment 30 days transpired before the State asked for a trial date. I do not find that 14 days within that first 30 day period are attributable to the defendant to excuse the State's delay simply because Beaston indicated in a written communication to the judge that he wanted a change of counsel but ultimately decided to retain his counsel. Neither do I find any indication why the out-of-state police witness whose testimony was needed to decide the admissibility of the defendant's confession question could not have been secured before mid-December so that the December 14, 1976, trial date could have been met. This witness was one of the Illinois police who took Beaston's confession on June 8, 1976. The State knew the identity and character of the witness's involvement with Beaston prior to the time the information was filed. The court in Lybarger was unpersuaded by the State's claim of good cause because of the unavailability of several witnesses. I would rule the trial court abused its discretion in refusing to grant Beaston's motion to dismiss for failure to afford him speedy trial under § 795.2, The Code.