FILED
DEC 27 1979
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed December 27, 1979
vs.	)	
TIMOTHY JOHN HAYES,	)	219/62596
Defendant-Appellant.	)	

Appeal from Black Hawk District Court - Dennis D. Damsgaard, Judge.

Defendant appeals conviction of the crime of possession of amphetamine with intent to deliver, a violation of section 204.401(1)(b), The Code 1975, contending his right to a speedy trial was denied when the State failed to bring him to trial within sixty days of the filing of the information charging him with the crime, after a mistrial was declared because of prosecutorial error. Affirmed.

Michael M. Pedersen & E. J. Gallagher of Gallagher, Martin, Keith & Langlas, Waterloo, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, Selwyn Dallyn, Assistant Attorney General, and David H. Correll, Black Hawk County Attorney, for plaintiff-appellee.

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

DONIELSON, J.

Defendant appeals conviction of the crime of possession of amphetamine with intent to deliver, a violation of section 204.401(1)(b), The Code 1975. For reversal, defendant contends the trial court erred in denying his motion to dismiss on grounds of denial of a speedy trial. Defendant asserts his constitutional and statutory right to a speedy trial was denied when he was not brought to trial within sixty days of the filing of the information against him as required by section 795.2, The Code 1975, after a mistrial was declared due to prosecutorial misconduct during the presentation of its case. We affirm.

I.

On January 19, 1977, an information was filed charging defendant with possession of a Schedule II controlled substance--amphetamine--with intent to deliver, a violation of section 204.401(1)(b), The Code 1975. Trial commenced on March 1, 1977. On the second day of trial, March 2, 1977, defendant objected to any attempt by the State to introduce evidence of marijuana use by defendant since he was charged only with possession of amphetamine. The trial court: Sustained the objection; ordered counsel for the State not to make reference to marijuana in the presence of the jury; and ordered counsel for the State to remove all marijuana and related items from the exhibits. Shortly thereafter, the prosecutor asked a witness in the jury's presence about a canister seized at defendant's residence. The witness, on the prosecutor's request, removed certain items from the canister and placed them in full view of the jury. Among the items removed were several pipes commonly used to smoke marijuana and several varieties of rolling papers. Defendant moved for a mistrial, which the trial court granted, and the jury was dismissed.

On March 23, 1977, sixty-four days after the information had been filed, defendant moved to dismiss the action alleging his constitutional and statutory right to a speedy trial had been violated when he was not brought to trial after the mistrial within sixty days from the filing date of the information. The trial court found the trial had been ordered rescheduled fifty-six days after the mistrial in order to allow the case to be heard before a jury selected from a new jury panel. The trial court ruled that State v. Wright, 234 N.W.2d 99 (Iowa 1975), allowed retrial within sixty days from the date of

mistrial and denied defendant's motion to dismiss. Defendant was tried and convicted of possession of a Schedule II controlled substance with intent to deliver.

II.

The Iowa Supreme Court held in State v. Wright, 234 N.W.2d 99 (Iowa 1975), that section 795.2, The Code 1975, [1] did not apply to a retrial following a mistrial, but the constitutional guaranty of a speedy trial does provide protection in a retrial situation. Wright, 234 N.W.2d at 102-03. It went on to hold that "criminal cases must be tried within 60 days after mistrial, if the case is to be retried." Id. at 103-04. A necessary corollary to this holding is that if the original trial is not brought within the sixty-day statutory period, then the issue of whether the retrial is brought within sixty days after the mistrial is immaterial, and the case must be dismissed. The deciding issue of this case thus becomes whether defendant was brought to trial within the meaning and time period of the speedy trial statute, when a mistrial was declared due to prosecutorial error before the case was submitted to the jury. Resolution of this issue requires a close reading of Wright and the cases applying its reasoning.

Defendant asserts Wright should be read narrowly so a defendant can be considered to have been brought to trial only after the case has been submitted to the jury and the mistrial is a result of the jury being unable to reach a verdict. While we agree the trial need not result in a verdict to be considered as having brought the defendant to trial, State v. Fromkin, 174 Neb. 849, 853, 120 N.W.2d 25, 27 (1969), defendant's suggested reading is too narrow when he asserts the critical point is when everything within the power of the prosecution has been done to complete the trial. This view does not comport with cases decided subsequently to Wright.

---

[1] The pertinent part of that section provides:

> If a defendant indicted for a public offense, whose trial has not been postponed upon his application, be not brought to trial within sixty days after the indictment is found, the court must order it to be dismissed, unless good cause to the contrary be shown.

§ 795.2, The Code 1975.

In State v. Butler, 243 N.W.2d 232 (Iowa 1976), the supreme court generally restated the Wright holding without qualification or modification. Although this case, like Wright, involved a mistrial due to the jury being unable to reach a verdict, id. at 232-33, we find it significant neither case explicitly limits its holding to its particular facts. There is none of the language found in Fromkin, 179 Neb. at 853, 120 N.W.2d at 27, on which defendant relies so heavily. An even more damaging case for defendant's argument is State v. Lybarger, 263 N.W.2d 545 (Iowa 1978). In that case the supreme court extended the Wright holding by requiring the State to retry the defendant within sixty days after entry of the order granting a new trial on grounds of prosecutorial misconduct unless good cause for any delay was shown; the case had not been submitted to the jury, id. at 546; State v. Cullison, 227 N.W.2d 121, 125 (Iowa 1975). An inference from these cases is that the cause for the retrial is irrelevant to the applicability of the Wright holding.

Without deciding at what point a defendant is considered to have been brought to trial, we hold that at least in this case—where the jury had been impaneled and a witness had been called—defendant was brought to trial within the meaning of the speedy trial statute, § 795.2, The Code 1975. We hasten to add, however, that if in the unlikely event a prosecutor deliberately causes a mistrial by misconduct to circumvent the sixty-day rule, this would prejudice defendant's rights to a speedy trial and be grounds for reversal. See State v. Aleshire, 89 Wash. 2d 67, 70, 568 P.2d 799, 801 (1977). We do not find that to be the case here.

Thus, defendant was brought to trial within sixty days of the filing of the information against him, satisfying section 795.2, The Code 1975. Defendant was also brought to trial within sixty days of the declaring of a mistrial, satisfying the requirements of Wright, 234 N.W.2d at 103-04. The trial court correctly overruled defendant's motion to dismiss based on denial of his right to a speedy trial; we affirm its judgment.

AFFIRMED.