IN THE COURT OF APPEALS OF IOWA

No. 0-192 / 99-1569
Filed May 10, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHRISTOPHER OLEN HUSMAN,
Defendant-Appellant.

FILED
MAY 10 2000
CLERK SUPREME COURT

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Appeal from the Iowa District Court for Linn County, Nancy Baumgartner and Jane Spande, District Associate Judges.

Defendant appeals from the judgment and sentence entered following his conviction of first-offense operating while intoxicated. *See* Iowa Code § 321J.2 (1999). Defendant contends his right to a speedy trial was violated and the district court erred by overruling his motion to dismiss. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and James G. Tomka, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Chris Odell, Assistant Attorney General, Denver D. Dillard, County Attorney, and Laurie Craig, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Vaitheswaran, JJ.

SACKETT, C.J.

Defendant-appellant, Christopher Olen Husman, appeals his conviction and sentence for OWI first offense, in violation of Iowa Code section 321J.2 (1998). Defendant contends the trial court erred in denying his motion to dismiss on speedy trial grounds. We affirm.

On January 21, 1999, defendant was arrested for OWI first offense, in violation of Iowa Code section 321J.2 (1999). Defendant initially appeared on January 22, 1999. He requested an attorney and the court appointed one for him. On February 3, 1999, the State filed a trial information charging defendant with OWI. On the same date, the district court filed an Order requiring defendant to appear for the scheduled arraignment on February 23, 1999 or file an approved written arraignment prior to that date. Defendant failed to appear for arraignment.

Defendant did not file a written arraignment until July 22, 1999. At that time he also demanded a speedy trial. The district court set a pretrial conference date for August 11, 1999 and a trial date for August 23, 1999. On August 10, 1999 defendant filed a motion to dismiss contending he was denied the right to a speedy trial. On September 3, 1999, the district court denied defendant's motion to dismiss. Defendant was subsequently convicted.

Defendant contends the State's failure to bring him to trial within ninety days from the filing of the trial information compels dismissal of the charge in accordance with Iowa Rule of Criminal Procedure 27(2)(b). The rule states:

> If a defendant indicted for a public offense has not waived his or her right to a speedy trial he or she must be brought to trial within ninety days after indictment is found or the court must order

the indictment to be dismissed unless good cause to the contrary be shown. Iowa R. Crim. P. 27(2)(b). This rule also applies to charges brought by trial information. *See* Iowa R.Crim.P. 5(5); *State v. Smith*, 573 N.W.2d 14, 17 (Iowa 1997).

We review speedy trial issues for correction of errors at law. *Smith*, 573 N.W.2d at 17. We are bound by the district court's findings of fact if supported by substantial evidence. *Id.* A district court has limited discretion in ruling on a motion to dismiss under Iowa R. Crim. P. 27(2)(b). *State v. Nelson*, 600 N.W.2d 598, 601 (Iowa 1999). On appeal we review the court's ruling for abuse of that discretion. *Id.*

Under our rule, if trial does not commence within ninety days from indictment, dismissal is compelled unless the State proves (1) defendant's waiver of speedy trial, (2) delay attributable to the defendant, or (3) "good cause" for the delay. *Smith*, 573 N.W.2d at 17; *State v. Finn*, 469 N.W.2d 692, 694 (Iowa 1991). "Delay attributable to defendant may constitute statutory good cause preventing the State from carrying out its obligation to bring him to trial." *State v. Keys*, 535 N.W.2d 783, 787 (Iowa App. 1995) (quoting *State v. Donnell*, 239 N.W.2d 575, 579 (Iowa 1976). Furthermore, a defendant may not actively or passively participate in the events that delay his or her trial and then later take advantage of that delay to terminate the prosecution. *State v. Ruiz*, 496 N.W.2d 789, 792 (Iowa App.1992); *Finn*, 469 N.W.2d at 694.

Defendant was not promptly tried because he failed to appear for arraignment or file a written arraignment. In *State v. Lyles*, 225 N.W.2d 124, 126 (Iowa 1975) the defendant was notified to appear for arraignment. He came to

court as ordered but failed to tell the court or the county attorney he was present or to advise necessary parties of his address. *Id.* The court finding delays attributable to defendant said:

> Although the State, not the defendant, has the obligation to bring a defendant to trial, delay attributable to the defendant may constitute good cause preventing the State from carrying out its obligation. The State's duty to provide a defendant a speedy trial does not require that it play a game of hide-and-go-seek with him.

*Id.* (citations omitted).

Defendant was on notice he was to appear for arraignment in district court on a certain date or file a written arraignment. He failed to do either until five months later. The delay in processing caused by defendant's failures is attributable to defendant not the State in determining whether defendant's speedy trial rights were violated. Defendant's trial date was 201 days after the trial information was filed. Of this number, 149 days were attributable to defendant. Subtracting delays attributable to defendant his trial date was within the ninety days. The district court did not abuse its discretion in overruling defendant's motion to dismiss.

**AFFIRMED.**