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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
DANIEL G. FLANDERS,)
Defendant-Appellant.)

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Appeal from Polk District Court - Dale S. Missildine, Judge.

Defendant appeals from his conviction of burglary in the second degree in violation of Iowa Code §§ 713.1 and .3 (1979) and possession of burglar's tools in violation of Iowa Code § 713.4 (1979). On appeal, he contends that the trial court erred (1) by denying his motion to dismiss based on the failure to conduct a speedy trial as required by Iowa Rule of Criminal Procedure 27(b)(2); (2) by denying his motion for mistrial based on the prosecution's questioning about his post-arrest silence; and (3) by denying his request for a short recess during trial in order to allow him an opportunity to recall a witness. AFFIRMED.

Robert R. Rigg, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Joseph P. Weeg, Assistant Attorney General, for plaintiff-appellee.

Considered en banc.

JOHNSON, J.

Defendant, Daniel Flanders, appeals from his conviction of burglary in the second degree in violation of Iowa Code §§ 713.1 and .3 (1979) and possession of burglar's tools in violation of Iowa Code § 713.4 (1979). On appeal, he contends that the trial court erred (1) by denying his motion to dismiss based on the failure to conduct a speedy trial as required by Iowa Rule of Criminal Procedure 27(b)(2); (2) by denying his motion for mistrial based on the prosecution's questioning about his post-arrest silence; and (3) by denying his request for a short recess during trial in order to allow him an opportunity to recall a witness. We affirm.

On July 15, 1980, a trial information was filed against defendant charging him with violating Iowa Code §§ 713.1, .3, and .4. A trial date was set for October 6, 1980. Defendant's counsel filed a motion to continue on the ground that counsel had another trial set for October 6. The court granted the motion and continued the case until October 22, 1980.

On October 17, 1980, the State moved to continue the case on the ground that a material witness was absent. A hearing was held on the motion wherein the State indicated that the witness would be available on or around October 31, 1980. Defendant demanded his right to a speedy trial during the hearing. The court concluded that there was good cause shown to continue the case and indicated that the case would be set for trial as soon as possible.

The case went to trial on December 10, 1980, at which time defendant renewed his demand for speedy trial and moved to dismiss on the ground that his right to a speedy trial had been violated. Trial court overruled defendant's motion. The jury found defendant guilty. Defendant then instituted this appeal.

I. Scope of Review. When violations of basic constitutional safeguards are alleged, this court makes an independent evaluation of the totality of the circumstances. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975). Other issues are reviewed on assignment of error only. Iowa R. App. P. 4.

II. Speedy Trial. Defendant's first contention is that the court erred in denying his motion to dismiss on speedy trial grounds. We disagree. Defendant's challenge focuses only on the 40-day delay between the time the State's witness returned and was available to testify and the actual date of trial; he concedes the court did not abuse its discretion by granting the two motions for continuance.

We begin our analysis with Iowa Rule of Criminal Procedure 27(2)(b) which provides that

> If a defendant indicted for public offense has not waived his right to a speedy trial he must be brought to trial within ninety days after indictment is found or the court must order the indictment dismissed unless good cause to the contrary be shown.

The case will not be dismissed even if brought after the ninety-day period if one of three things has occurred: "(1) the defendant has waived his right to a speedy trial; (2) the delay is attributable to the defendant; or (3) there is 'good cause' for the delay." State v. Petersen, 288 N.W.2d 332, 335 (Iowa 1980). Here the defendant did not waive his right to a speedy trial and he was not directly responsible for the delay in question. The only question we face, therefore, is whether there was good cause for the delay. While the State bears the burden to show good cause for the delay at the trial level, on appeal defendant bears the burden to show that trial court abused its discretion in finding good cause. State v. Ege, 274 N.W.2d 350, 354 (Iowa 1979).

It is now well settled that the cornerstone of our inquiry is the reason given for the delay. State v. Petersen, 288 N.W.2d at 335 (overruling prior cases to the extent that they have "not emphasized the singular importance of the reason for delay in testing good cause under criminal rule 27(2)(b).") In Petersen, the court indicated that the surrounding circumstances are not disregarded, but that

> [g]ood cause, under our rule, focuses on only one factor: the reason for the delay. If the reason for the delay is sufficient the other factors [-length of the delay, whether defendant asserted his right to a speedy trial, and whether he was prejudiced by the delay-] are not needed. If the reason for the delay is insufficient the other factors will not avail to avoid dismissal. . . .
>
> The shortness of the period, the failure of the defendant to demand a speedy trial, and the absence of prejudice are legitimate considerations only insofar as they affect the strength of the reason for delay. This means that, to whatever extent the delay has been a short one, or the defendant has not demanded a speedy trial, or is not prejudiced, a weaker reason will constitute good cause. On the other hand, if the delay has been a long one, or if the defendant has demanded a speedy trial, or is prejudiced, a stronger reason is necessary to constitute good cause.

Id.

The record reveals that trial in this matter was scheduled for October 6, 1980. On October 5, 1980,[1] defense counsel moved for a continuance in the matter due to a conflict with a trial in another matter. The State did not resist the continuance and the trial was set for October 22nd. On October 17th the State requested a continuance in the trial date due to the unavailability of a material witness. A hearing on the State's motion was set for the 21st. At the hearing the trial court concluded that:

> . . . taking the record that I have heard today, the State was ready to proceed within the 90-day period on October 6, 1980. As a benefit to the defendant because defense counsel was already in trial in another matter and the State agreed to a continuance, which the State did not have to do, and the State realizing a speedy trial situation and the potential loss of a witness going on vacation could have in this—that it be tried at this time—and therefore do not think it's fair to

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[1] The court file reflects that defendant's motion for continuance was actually filed on October 17, 1980.

> the State to find themselves in the proverbial box because of something that they did on October 6th that benefited the defendant.

The trial court concluded that "good cause" had been shown and assured the parties that the matter would be heard as soon as possible, although the court did note potential conflict in the scheduling of the trial due to the status of the court docket. The court subsequently set the trial for December 10th at which time the matter proceeded to trial.

In assessing good cause, we note that the defendant himself moved for the first continuance which required rescheduling of the trial date. Failure to bring a defendant to trial within the time specified has been excused where defense counsel has moved for a continuance. See State v. Manning, 224 N.W.2d 232, 236 (Iowa 1974). The second continuance requested by the State was due to the absence of a material witness. The absence of a material witness for the State has also been recognized as "good cause." See State v. Petersen, 288 N.W.2d at 334-35. We believe the only issue then is whether the 40-day delay from the date the State indicated it was ready to proceed to trial and the actual trial date was for "good cause." We conclude that it was.

In examining the reason for the delay we cannot evaluate it in a vacuum. Id. "The surrounding circumstances bear on the focal point of the inquiry, that is, the reason for the delay." Id. In Petersen the court found "good cause" for the delay where the defendant did not move for a continuance or waive his right to a speedy trial. Id. at 334. In that case, the first delay was attributable to an honest "misunderstanding" between counsel, the second was caused by the State in seeking a continuance because of the unavailability of a material witness. Unlike the situation in Petersen, the defendant here demanded a speedy trial at the hearing where the trial court found that "good cause" existed for the delay due to the absence of a State's material witness. The consideration, however, of "[t] he shortness of the period, the failure of the defendant to demand a speedy trial, and

the absence of prejudice are legitimate considerations only insofar as they affect the strength of the reason for delay." Id. at 335. These factors are not conclusively dispositive of the matter in and of themselves. Inordinate weight should not be given to any single factor.

We cannot exorcise the 40-day period from the scheme of events leading to trial. We cannot say that the court docket was the only reason for the delay. The defendant, by his continuance, started a chain of events which created witness problems for the State and which, in turn, posed problems with the court docket. Admittedly, court congestion standing as the sole reason for the delay may not be sufficient for a finding of "good cause" for failure to bring a defendant to trial within the 90-day period. See State v. Goff, 244 N.W.2d 479 (Iowa 1976). However, where defendant elects to continue the matter beyond the ninety days and the new date disrupts the State's case, and where the dockets are congested, "good cause" may be present. The 90-day requirement is intended as a shield for the protection of the defendant and not as a sword for the annilation of the State's case. In this instance the several bases for the delay have a conjunctive effect warranting a finding of "good cause." Under this record, we conclude that good cause for the delay was created by: 1) a continuance requested by the defendant; 2) absence of a material witness for the State; and 3) a congested court docket.

The trial court is given discretion in determining the existence of good cause and we will not disturb the decision absent a finding of abuse of discretion. See State v. Lybarger, 263 N.W.2d 545, 547 (Iowa 1978). We do not intimate by this opinion that once a defendant has moved for a continuance that the State may purposely delay trial, but by the same token, the court should not be precluded from considering that fact in its examination of the circumstances for "good cause."Finding no abuse of discretion, we affirm the trial court.

IV. Post-Arrest Silence. Defendant next argues that trial court erred in not granting his motion for mistrial based upon the State's use of his post-arrest

silence. The State contends: 1) that defendant failed to preserve any assignment of error on this issue; 2) that the use of post-arrest silence was not an attack of the essence of defendant's case; and 3) that any error was harmless.

The alleged error arose during the State's examination of officer Allen regarding the interrogation of defendant.

> Q. Did [defendant] say anything else?
>
> A. No sir, not that I recall.
>
> Q. Did you ask [defendant] other questions without response?
>
> A. I did.

Defense counsel objected to the question, requested that the jury be admonished, and moved for a mistrial. The court overruled defendant's motion for a mistrial but did admonish the jury.

A trial court enjoys considerable discretion in ruling on motions for a mistrial and will be reversed only on a showing of an abuse of discretion. State v. Brewer, 247 N.W.2d 205, 216 (Iowa 1976). Only the abuse of discretion is reviewable. Id. at 211. We will not reverse unless defendant shows "that such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Morrison, 323 N.W.2d 254, 256 (Iowa 1982), quoting State v. Buck, 275 N.W.2d 194, 195 (Iowa 1979).

The defendant's right to remain silent is jealously guarded.

> . . . [This] right . . . is grounded in the Fifth and Sixth Amendments which apply to the states through the Fourteenth Amendment of the United States Constitution. The right of an accused to remain silent without fear of being chided at trial for doing so is clearly a fundamental right. [citation]

State v. Porter, 283 N.W.2d 351, 352-53 (Iowa 1979). "[N] ot every error [however] even one of constitutional proportions, justifies a new trial or other relief. A defendant is entitled to a fair trial but not necessarily a perfect one." State v. Freeman, 297 N.W.2d 363, 367 (Iowa 1980). "To deny defendant a new trial we must say the error was harmless beyond a reasonable doubt." Id.

"The general rule is that improper testimony . . . or prosecutorial inquiry is not unduly prejudicial if the court admonishes the jury." State v. Burrell, 255 N.W.2d 119 (Iowa 1977). " 'Only in instances where it is manifest that the prejudicial effect of the evidence on the jury remained, despite its exclusion, and influenced the jury is the defendant denied a fair trial and entitled to reversal.' " State v. Johnson, 219 N.W.2d at 698 (quoting State v. Peterson, 189 N.W.2d at 896). See also State v. Williams, 315 N.W.2d 45, 55 (Iowa 1982)).

In the present case defendant contends that even though the objection of counsel was sustained and the jury admonished to disregard the matter, the mistrial should still have been granted because of the prejudicial nature of the question. The record reflects that the trial court took immediate curative action, that there were no further references to defendant's silence, see United States v. Dixon, 593 F.2d 626, 630 (5th Cir. 1979), cert. denied, 444 U.S. 861, 100 S. Ct. 126, 62 L. Ed. 2d 82 (1980), and that there were no erroneous instructions given. See State v. Peterson, 189 N.W.2d at 896.

The Iowa court has recognized the harmless error principle regarding prosecutorial comments on post-arrest silence. See State v. Porter, 283 N.W.2d at 352-53. The Fifth Circuit in United States v. Meneses-Davila, 580 F.2d 888 (5th Cir. 1978) recognized different categories of harmless error.

> Whether a prosecutor's erroneous comment is cured by the harmless error doctrine is a fact-dependent determination handled on a case-by-case basis. Chapman [547 F.2d 1240 (5th Cir.), cert. denied, 431 U.S. 908, 97 S. Ct. 1705, 52 L. Ed. 2d 393 (1977)] examined and harmonized the case law and found that our cases fall into three categories:

> [1] When the prosecution uses defendant's post-arrest silence to impeach an exculpatory story offered by defendant at trial and the prosecution directly links the implausibility of the exculpatory story to the defendant's ostensibly inconsistent act of remaining silent, reversible error results even if the story is transparently frivolous.
>
> [2] When the prosecutor does not directly tie the fact of defendant's silence to his exculpatory story, i.e., when the prosecutor elicits that fact on direct examination and refrains from commenting on it or adverting to it again, and the jury is never told that such silence can be used for impeachment purposes, reversible error results if the exculpatory story is not totally implausible or the indicia of guilt not overwhelming.
>
> [3] When there is but a single reference at trial to the fact of defendant's silence, the reference is neither repeated nor linked with defendant's exculpatory story, and the exculpatory story is transparently frivolous and evidence of guilt is otherwise overwhelming, the reference to defendant's silence constitutes harmless error.

Id. at 893.

In applying the above principles, we find error, if any, was harmless. The State did not impeach defendant's exculpatory story; the State did not connect defendant's silence with defendant's exculpatory story; and there was but a single reference at trial which was unrelated to defendant's exculpatory story. Further, unlike the facts in Porter, 283 N.W.2d at 351, in the present case, defendant's objection was sustained, the jury admonished and no further reference was made to defendant's silence. We are satisfied that the admonition by the court to the jury to disregard the question removed any prejudice to the defendant. Accordingly, we find that the trial court did not abuse its discretion in overruling defendant's motion for mistrial.

IV. Continuance. Defendant also argues that the trial court erred in not granting his request for a short recess to allow him the opportunity to recall a witness. We disagree. "[The] granting of a continuance rests in the sound

discretion of the trial court." State v. Johnson, 219 N.W.2d at 696. See also State v. King, 191 N.W.2d 650, 657 (Iowa 1971). On the record before us, we find no abuse of discretion. Finding no error, we affirm the trial court.

AFFIRMED.

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

DONIELSON, J. (dissenting)

I dissent.

As the majority points out, whether there is "good cause" for delay in bringing the defendant to trial focuses on "only one factor: the reason for the delay." Petersen, 288 N.W.2d at 335. But other factors affect the strength of the reason needed to constitute good cause: the "length of the delay, whether the defendant asserted his right to a speedy trial, and whether he was prejudiced by the delay." Id. In Petersen, the defendant never demanded a speedy trial nor did he even object to the State's motion to continue the trial date. Moreover, the defendant was never incarcerated or prejudiced in any way, and the delay, which the court called a "relatively short one," was only 14 days. The Petersen court concluded that "[t]hese matters show that a less serious reason will suffice to constitute good cause." Id.

The instant case presents the exact opposite situation from that in Petersen. The defendant here consistently demanded his right to a speedy trial and suffered prejudice by the fact that he was incarcerated. The delay was not a short one; it lasted 40 days, almost three times as long as the delay in Petersen. The majority states that the factors affecting the strength of the reason "are not conclusively dispositive of the matter in and of themselves. Inordinate weight should not be given to any single factor." In so stating, the majority misconstrues the language in Petersen. The majority does not weigh these factors in determining the strength of the reason needed to constitute good cause as Petersen mandated, but balances these factors along with the asserted reason, see Barker v. Wings, 407 U.S. 514, 580, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101, 116-17 (1972), an approach the Petersen court expressly rejected. Petersen, 288 N.W.2d at 335. The requirements of our rule 27(2)(b) are more stringent than the constitutional protections set forth in Barker. Id. at 334. I believe, therefore, that the

circumstances of this case require us to find that a strong reason is needed to constitute good cause for the 40-day delay.

The reason for the 40-day delay was the congestion of the court docket. While the defendant requested a continuance of 16 days, he was ready to proceed on October 31. So was the prosecution. Thus, while the defendant did begin "the chain of events" which required changing the trial date, the congested docket was the sole reason that the trial was not held until December 10 when all parties were prepared to proceed on October 31. Under Iowa law, the crowded court docket is not in and of itself a sufficient reason for the delay, State v. Goff, 244 N.W.2d 579, 583 (Iowa 1976). Only when there have been exigent circumstances in addition to the crowded court docket, has good cause been found. State v. Jennings, 195 N.W.2d 351 (Iowa 1972). In Jennings, the delay was attributable not only to a crowded court docket, but also the partial incapacitating illness of one of the judges in the district and the vacation of the other judge. Id. at 355. In addition, the defendant in Jennings had been released on bond. Confining itself to these particular facts, the court stated that:

> [d]elay resulting from congestion of a trial docket attributable to exceptional circumstances, and unavailability of prosecutor or trial judge, may constitute good cause for a reasonable trial delay. . . .
>
> Instantly, a relatively prompt trial was afforded under exigent circumstances constituting the good cause referred to in [rule 27(b)(2)] . . . .
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> This does not mean, however, particularly under existing judicial districting, chronic crowded dockets, sickness of a trial judge, or unavailability of judges due to vacation schedules will alone suffice as good cause for trial delay. The public policy inherent in [rule 27(b)(2)] requires trial within [90] days absent good cause, and it is the State's duty to effectuate that policy.
>
> Confining ourselves to the factual situation here involved we hold trial court did not err in