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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Appellant,) Filed September 9, 1977
vs.) 198
59642
STEVEN LYNN LYBARGER,)
Appellee.)

Appeal from Pottawattamie District Court - Paul Sulhoff, Judge.

The State appeals dismissal of the charge against the defendant for its failure to seek his speedy retrial. Reversed and remanded for retrial.

Philip J. Willson, of Council Bluffs, for Appellee.

Richard C. Turner, Attorney General of Iowa, and Lyle A. Rodenburg, Pottawattamie County Attorney, for Appellant.

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

PER CURIAM

The State appeals the dismissal of the charge against defendant Lybarger for its failure to seek his speedy retrial. We reverse and remand.

The jury returned a verdict of guilty of second degree murder on May 21, 1975. A new trial was granted November 20, 1975 with the trial court ordering "the case assigned as soon as practicable . . ." The State appealed the order for new trial; the supreme court's final disposition denying reconsideration of the retrial issue was entered on February 17, 1976.

The trial court indicated at the hearing held on April 26, 1976, that it considered the appropriate 60day period for retrial to commence "after all appeals to the Supreme Court were concluded on February 17 or 20th, 1976." Neither counsel objected to this conclusion.

On April 8, 1976, within the 60-day period, Lybarger requested speedy retrial, a transcript at state expense of the first trial proceedings, and an independent expert examination of pubic hairs introduced as evidence in the first trial. During the April 26, 1976 hearing upon Lybarger's requests, trial was set for June 2, 1976 with the transcript and examination requests granted. It is apparent from the interchange between counsel and the judge in the April 26th hearing that the June 2 trial date was assigned to accommodate the time required for transcript preparation by the court reporter and the out-of-state expert examination of pubic hair requested by Lybarger.

We find the ruling in State v. Butler, 243 N.W.2d 232 (Iowa 1976) to be controlling. The trial court abused its limited discretion in dismissing the case. Had the case proceeded to trial on June 2 the retrial would have occurred within a 105-day applicable period. The 45-day delay is analogous to the 42-day delay allowed in **Butler** to provide for the production of transcripts. Good cause attributable to the defendant Lybarger is reflected in the record to excuse the delay in speedy retrial.

Reversed and remanded for retrial.