FILED
DEC 29 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,) Filed December 29, 1982
vs.)
BRUCE DALE GEARIN,) 2-408 / 66749
Defendant-Appellant.)

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Appeal from Washington District Court - L. R. Carson, Judge.

Defendant appeals his conviction of burglary in the second degree in violation of Iowa Code §§ 713.1, .3. REVERSED.

Steven E. Ort of Johnston & George, Keokuk, Iowa, for defendant-appellant.

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

Heard en banc.

PER CURIAM

Defendant appeals his conviction of burglary in the second degree in violation of Iowa Code §§ 713.1, .3. He alleges that the trial court erred in failing to rule on his motion to suppress before the commencement of his trial, the court erred in eventually overruling his motion to suppress his confession allegedly obtained in violation of his constitutional rights, and he was denied effective assistance of counsel. We reverse.

Defendant was charged by information with a 1978 restaurant break-in. He filed a motion to suppress certain inculpatory statements made by him to the authorities, alleging that those statements were not given voluntarily and that he did not voluntarily and intelligently waive his constitutional rights set forth in Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). A pretrial hearing on defendant's motion was held, but the court did not make a ruling at that time; instead, it said "let's hear the evidence in the case before I make a ruling." During the course of the trial, the court overruled defendant's objections to the introduction of the challenged evidence. He was found guilty by the jury and his posttrial motions based on the alleged inadmissibility of his confession were overruled. Judgment was entered against defendant on April 28, 1978.

On April 8, 1980, defendant filed an application for postconviction relief raising issues of ineffective assistance of counsel and violation of his Miranda rights. He filed an amended petition on October 8, 1980, alleging that trial counsel failed to pursue an appeal of defendant's 1978 conviction as counsel was directed and requesting an extension of time in which to present a direct appeal from his conviction. On May 1, 1981, the trial court ruled that defendant in fact wanted to appeal his conviction in 1978; subsequently, the supreme court, per Justice Uhlenhopp, granted permission to file a delayed notice of appeal.

I. We first note our disapproval of the way in which the trial court handled defendant's motion to suppress. Iowa R. Crim. P. 10(8) states that "[a] pretrial motion shall be determined without unreasonable delay. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record." In this case, the trial court followed neither requirement. First, the motion was not decided upon until the challenged evidence was introduced at trial. We believe this delay was unreasonable under the circumstances. In addition, the court did not state any findings at all or explain its reasoning in eventually overruling the motion. We cannot countenance this disregard of our rules of criminal procedure.

II. We also agree with defendant that the trial court erred in failing to sustain his motion to suppress his inculpatory statements. After defendant was arrested, he was notified of his Miranda rights and signed a waiver form. At one point during the subsequent interrogation, he asked to talk to his attorney, but efforts to reach his attorney on the telephone proved fruitless. After again notifying defendant of his rights, the interrogating officer continued to carry on a "conversation" with defendant during which he confessed to committing the offense.

The State has the burden of proving by a preponderance of the evidence that defendant's confession was given only after he had knowingly, voluntarily and intelligently waived his constitutional rights. State v. Coburn, 315 N.W.2d 742, 745 (Iowa 1982). In determining this issue, we examine the totality of the circumstances. Id. In this case, defendant continued to be questioned (even if in a less direct sense) after he asked to be allowed to speak to his attorney. "If an accused in any manner, at any time, expresses a desire to consult an attorney, the interrogation must cease until the accused has an opportunity to confer with counsel and have counsel present during subsequent questioning." State v. Lamp, 322 N.W.2d 48, 54 (Iowa 1982). Under these circumstances, we do not believe that

the State has satisfied its burden of proving that defendant voluntarily and intelligently waived his right to counsel. The motion to suppress should have been sustained.

Defendant's conviction is reversed. The cause is remanded for a new trial.

REVERSED AND REMANDED.