



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellant,)

vs.)

ALLAN L. VAN BEEK, GLENN)

VAN BEEK, and MATTHEW V.)

KOSTERS,)

Defendants-Appellees.)

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8-656
88-742

Appeal from the Iowa District Court for Sioux County
(5412, 5413 & 5414), Terry L. Huitink, Judge.

The State appeals the trial court's order dismissing
the trial information on speedy indictment grounds.

AFFIRMED.

Thomas J. Miller, Attorney General of Iowa, and Mark
Joel Zbieroski, Assistant Attorney General, for
plaintiff-appellant.

Stanley E. Munger of Kindig, Beebe, Rawlings, Nieland,
Probasco & Killinger, Sioux City, for defendant-appellee
Allan L. Van Beek.

Randall A. Roos, Sioux Center, for defendant-appellee
Glenn Van Beek.

Myron D. Toering, Sioux Center, for defendant-appellee
Matthew Kusters.

Heard by Schlegel, P.J., and Hayden and Habhab, JJ.

SCHLEGEL, J.

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The State of Iowa appeals the trial court's order dismissing the trial information against three defendants on speedy indictment grounds. The State contends that the defendants' arrest, followed about an hour later by their unconditional release before charges were filed did not trigger the running of the speedy indictment time. We affirm.

On January 13, 1988, a police officer observed the defendants, Allan Van Beek, Glenn Van Beek, and Matthew Kusters, engaging in activity that he believed to be consistent with the use of cocaine. He called for the assistance of additional police officers, and placed all three of the defendants under arrest. All defendants were restrained and advised of their Miranda rights. Certain items, believed to contain cocaine residue, were seized. The officers then contacted the county attorney by telephone. About an hour later, before the filing of any criminal charges, the defendants were unconditionally released. The items seized were sent to the Iowa State Criminalistics Laboratory. The report showing the items tested positive for cocaine was received on February 26, 1988. Citations were then served on the defendants between February 29 and March 10 for possession of a controlled substance, and a trial information was filed on March 21, 1988.

The defendants filed motions to dismiss the trial information on grounds of preindictment delay in violation of Iowa Rule of Criminal Procedure 27(2)(a). The trial court sustained the motions, ruling that the period between the January 13 arrests and the filing of a trial information on March 21 exceeded the permissible forty-five days.

The State argues that rule 27(2)(a) applies only to persons who have been arrested and formally charged with the commission of a crime, and that in this case the time should run from the issuance of citations to the defendants, and not from their arrest on January 13.

The Iowa Supreme Court has defined arrest, as it relates to rule 27(2)(a), by looking at the definition of arrest provided in Iowa Code section 804.5 (1977):

Arrest is the taking of a person into custody when and in the manner authorized by law, including restraint of the person or his or her submission to custody.

State v. Schmitt, 290 N.W.2d 24, 26 (Iowa 1980). The manner of making an arrest as described in Iowa Code section 804.14 (1977), is also set out:

The person making the arrest must inform the person to be arrested of the intention to arrest him or her, the reason for arrest, and that he or she is a peace officer, if such be the case, and require him or her to submit to the person's custody, except when the person to be arrested is actually engaged in the commission of or attempt to commit an offense, or escapes, so that there is not time or opportunity to do so;

Id. That case also holds that: "The lack of follow-up of booking or charges does not eradicate the event or nullify it as an arrest." Id.

The three defendants in the case at bar were "arrested" on January 13. All the elements of an arrest were present, and the State does not contend otherwise. The State advocates a holding that "arrest" as used in rule 27(2)(a), Iowa Rules of Criminal Procedure, means the filing of formal charges and that "since charges were not made against the defendants at the time of their January 13th arrests, . . . those arrests are not the type to trigger the running of the speedy information clock" (emphasis added).

We believe that Schmitt controls this case. We look to the plain meaning of the rule for guidance:

Rule 27(2).

* * *

a. When an adult is arrested for the commission of a public offense, . . . and an indictment is not found against him within forty-five days, the court must order the prosecution to be dismissed, unless good cause to the contrary is shown or the defendant waives his right thereto.

There is no claim by the State that there was good cause for the delay, and none is found. Defendants did not waive their rights to speedy indictment.

The trial court was correct in dismissing the information. We affirm that ruling.

AFFIRMED.

Hayden, J., concurs; Habhab, J., dissents.

HABHAB, J. (dissenting)

I respectfully dissent. I do so for the reasons hereafter stated.

Rule 27(2)(a) does provide that if an indictment is not found against an adult within forty-five days from the date of his arrest for the commission of a public offense, the court must order the prosecution dismissed, unless good cause to the contrary is shown or the defendant waives his right thereto. I agree with the majority that under that rule the date of the arrest for the commission of a public offense starts the running of the forty-five days.

However, I would hold that where, as is the case here, the defendants are unconditionally released after the arrest that this stops the running of the time period. This is so for the defendants are no longer under arrest for the commission of a public offense. I believe this result is consistent with the overall purpose of rule 27(2)(a), which is oftentimes referred to as the "speedy indictment" rule.

The purpose of rule 27 is stated at section 2 thereof as follows: "It is the public policy of the State of Iowa that criminal prosecutions be concluded at the earliest possible time consistent with a fair trial to both parties." In many respects, it implements article I, section 10 of the Iowa Constitution and the sixth amendment right to a speedy trial under the United States

Constitution. State v. Allnutt, 156 N.W.2d 266, 268 (Iowa 1968).

The purpose of speedy indictment and speedy trial protections, both constitutional and statutory, is:

To relieve one accused of a crime of the hardship of indefinite incarceration awaiting trial or the anxiety of suspended prosecution, if at liberty on bail, and to require courts and peace officers to proceed with the trial of criminal charges with such reasonable promptness as proper administration of justice demands.

Id.

With that purpose in mind, I do not believe that the forty-five-day time should continue to run against the State where the defendant is unconditionally released. Once the defendants were released, they were under no more jeopardy or hardship than any other citizen. There were no charges pending, nor were they in the midst of criminal prosecution.

We know that if charges were brought within the forty-five-day period and later dismissed, the speedy trial guarantee under the sixth amendment to the United States Constitution is no longer applicable. United States v. MacDonald, 456 U.S. 1, 71 L. Ed. 2d 696, 102 S. Ct. 1497 (1982). We also know that under rule 27(1) that if a criminal prosecution is dismissed by the court in the furtherance of justice, that although the "dismissal is a bar to another prosecution for the same offense if it is a simple or serious misdemeanor," it is "not a bar if the

offense charged be a felony or an aggravated misdemeanor"; and that "furtherance of justice" under this rule includes facilitating the state in gathering evidence, procuring witnesses, or plea bargaining. Iowa R. Crim. Pro. 27(1); State v. Fisher, 351 N.W.2d 798, 800-01 (Iowa 1984); see also State v. Lundean, 297 N.W.2d 232 (Iowa App. 1980) (relevant considerations in determining whether to dismiss).

For the most part then, the clock stops when a case is dismissed under rule 27(1); I believe the same result should obtain when a defendant, after an arrest, is unconditionally released for once a defendant is unconditionally released, he is no longer under arrest for the commission of a public offense. I would reverse.