FILED
FEB 24 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellant,) Filed February 24, 1982

vs.) 2-29/66897 353

EDWIN WAYNE QUAIL,)

Defendant-Appellee.)

STATE OF IOWA,)

Plaintiff-Appellant,)

vs.) 2-30/66898

THOMAS JOSEPH REHM,)

Defendant-Appellee.)

Appeal from Sac District Court, R. K. Richardson, Judge.

The State appeals from the trial court's dismissal of separate informations charging defendants with possession of a controlled substance in violation of section 204.401(3), The Code 1981, claiming the court erred in finding the State failed to establish good cause for failure to conduct a speedy trial as required by Iowa R. Crim. P. 27(2)(b). AFFIRMED.

Lon R. Tullar, County Attorney, for plaintiff-appellant.

Joseph Heindereich of Dresselhuis & Heidenreich, Odebolt, for defendant-appellee, Quail.

Charles Schulte of Schulte & Graven Law Firm, Sac City, for defendant-appellee Rehm.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

PER CURIAM

The State appeals from the trial court's dismissal of separate informations charging defendants with possession of a controlled substance in violation of section 204.401(3), The Code 1981, claiming the court erred in finding the State failed to establish good cause for failure to conduct a speedy trial as required by Iowa R. Crim. P. 27(2)(b). Iowa R. Crim. P. 27(2)(b) provides: If a defendant indicted for a 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 to be dismissed unless good cause to the contrary be shown. We affirm the trial court's finding the State failed to establish good cause for the failure to conduct a speedy trial as required by Iowa R. Crim. P. 27(2)(b).

Defendants were charged in separate trial informations with possession of marijuana in violation of section 204.401(3), The Code 1981, on February 2, 1981. On February 17, 1981, defendant Quail filed a motion to suppress evidence and on March 11, 1981, the defendant Rehm filed a motion to suppress. A hearing on these motions to suppress evidence was scheduled for 2:30 p.m. April 6, 1981, at which time attorneys for both defendants indicated they wanted to expand the motions to suppress in order to challenge the authenticity of an officer's statements. The State resisted defendants' attempt to orally amend the motion to suppress since the attempted amendment was not timely under the Iowa Rules of Criminal Procedure. The court noted at that juncture it would be difficult to conduct a hearing on the motion before trial, which had been tentatively scheduled for the last week in April, due to a congestion of the trial docket. On April 10, 1981, the county attorney in charge of the prosecution wrote the attorneys representing each of the defendants asking for a written waiver of defendants' right to speedy

trial. In these letters, it was indicated that if defendants refused to waive speedy trial, he would "have to obtain a court date for trial, [and from] talking with Larry Murphy [court administrator], that would be April 28, 1981. Please advise." Counsel for defendant Quail did not respond to the county attorney's letters. Counsel for defendant Rehm answered, stating he had no objection to the waiver but would have to check with his client. On May 5, 1981, the State filed a motion for a hearing on the motions to suppress. On May 13, 1981, defendants each filed a motion to dismiss for failure to comply with the speedy trial provision of Iowa R. Crim. P. 27(2)(b). The ninety-day deadline passed on May 4, 1981(a Monday following the ninetieth day). On May 27, 1981, the court dismissed the information finding defendants had been denied a speedy trial.

The State appeals, contending the trial court erred in dismissing the informations because the delay was for good cause and attributable to defendants. We find there was no good cause for the delay sufficient to justify denial of a speedy trial for defendants.

Our review of the trial court's order dismissing the information is limited to determining whether the trial court abused its discretion. State v. LaPlant, 244 N.W.2d 240, 242 (Iowa 1976). Our review is not de novo. Id. Thus, we accept the trial court's findings of fact if supported by substantial evidence. We also note the State has the burden of establishing good cause for the delay. State v. Petersen, 288 N.W.2d 332, 334 (Iowa 1980).

We cannot find that the trial court abused its discretion in concluding that the State failed to establish good cause for the delay. The State attributes the delay to defendant's motion to suppress, the subsequent recasting of the motion to suppress and the attempt to orally expand the motion to suppress. The strength of

this argument is weakened by the fact the county attorney indicated he would be able to proceed to trial on April 28, 1981, if defendants refused to waive speedy trial. Implicitly, the county attorney admitted the State's ability to be prepared for trial on April 28, 1981, despite defendants' motions. We agree with the trial court's conclusion defendants did not waive their right to speedy trial and the failure to provide a speedy trial as required by Iowa R. Crim. P. 27(2)(b) was attributable to chronically congested court dockets. (See State v. Goff, 244 N.W.2d 579, 582 (Iowa 1976); State v. Hines, 225 N.W.2d 156, 158-59 (Iowa 1975)) or the county attorney's failure to push for trial. After considering the facts presented in the record and the supreme court's discussion in State v. Petersen, 288 N.W.2d 332, 335 (Iowa 1980), we find the trial court did not abuse its discretion in finding good cause for the delay was not shown and dismissing the information. The trial court's order is affirmed on both appeals.

AFFIRMED.

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

DONIELSON, J. (dissenting)

I dissent.

I cannot agree with the majority's conclusion that the trial court was correct when it found that the state had failed to establish good cause for failure to conduct a speedy trial as required by Iowa R. Crim. P. 27(2)(b). It is very clear that the cause for delay beyond the 90 day period is directly attributable to the defendants' oral motion to amend which expanded the scope of the April 6, 1981, suppression hearing.

Quail was arraigned on February 9, 1981, and Rehm was arraigned on February 17, 1981. Both defendants filed motions to suppress within the 40 day period required by Iowa R. Crim. P. 10(4). On February 23, 1981, the suppression hearing for both defendants was ordered set for April 6, 1981. (56 days after Quail's arraignment, 48 days after Rehm's arraignment, and only 30 days before the 90 day speedy trial period expired.) On this late date both defendants decided to orally amend and expand their motion to suppress to include an entirely new issue. The county attorney resisted this amendment and informed the court that while he was prepared to argue the suppression issues in the original motion, this late amendment would make it impossible for him to proceed. Therefore, the hearing was not held as scheduled and it was subsequently impossible to reschedule the hearing during the remaining 30 days before the speedy trial time period ended.

This delay should not be attributed to the state. In fact, after this initial delay, and in response to a letter from the county attorney, Rehm's attorney indicated his personal willingness to waive the speedy trial requirement, while Quail's attorney did not respond at all to a similar letter. In my view, these actions indicate at the very least a lack of professional courtesy on the part of these attorneys to the county attorney, who had unilaterally undertaken a task

which is the joint responsibility of the state, the court and the court administrator, ie. to see that these cases were scheduled for trial during the 90 day period. In fact, these actions effectively lulled the court and prosecutor into believing that the attorneys involved with this case were more concerned about obtaining a ruling on the expanded suppression issues than they were with obtaining a speedy trial.

It is, of course, the state's burden to demonstrate good cause in order to be excused from the speedy trial requirements of Iowa R. Crim. P. 27(2)(b). In determining "good cause" the court considers only the reason for the delay. State v. Petersen, 288 N.W.2d 332, 335 (Iowa 1980). In evaluating the sufficiency of the reasons given by the state in the present case as an excuse for the delay in bringing defendants to trial, I am cognizant of the rule that chronic court congestion is not good cause. State v. Hines, 225 N.W.2d 156, 158 (Iowa 1975). However, I do not believe that this rule precludes consideration of actions by the defendants which, as a result of a normal heavy litigation schedule, act as a precipitating cause of the delay. In the present case, it appears that defendants' proffered amendment injecting new issues involving suppression of evidence served to frustrate prior efforts by the court to accommodate trial within the ninety-day period. In this regard, the record indicates that it was likely that if the suppression hearing had been concluded on April 6th, the time allotted therefore based upon the issues presented by defendants up until that time, the trial date would have been scheduled in the month of April. I cannot conclude, as defendants suggest, that the district court, having once allotted time to hear the issues involving suppression of evidence, was required to superimpose the continued suppression hearing on newly injected issues over the existing assignment in order to accommodate defendants' right to trial within ninety days. Stated somewhat differently, I would hold that while it may have been possible to

try defendants within the ninety-day period, this was not reasonably practicable as a result of litigation strategy invoked by defendants after sixty-three days of the ninety-day period had expired. I view the delay as being attributable to the defendants and good cause for failure to have a speedy trial. To say otherwise is totally unreasonable in my view.

I would reverse the trial court's order dismissing the charges against the defendants.