FILED
FEB 22 1979
201
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Petitioner,) Filed February 22, 1979

vs.)

IOWA DISTRICT COURT, IN AND FOR LINN COUNTY, and ANTHONY R. SCOLARO, ASSOCIATE DISTRICT JUDGE,) 772 / 2-61664

Defendant-Respondent.)

Certiorari to Linn District Court - Anthony R. Scolaro, Judge.

Certiorari action alleging trial court acted illegally in dismissing criminal charge when sufficient number of jurors unavailable on trial date. Writ sustained.

Eugene J. Kopecky, Linn County Attorney, and Craig Kelinson, Assistant County Attorney, of Cedar Rapids, counsel for petitioner.

John M. Maher & James L. Chipokas, of Cedar Rapids, counsel for respondent.

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

DONIELSON, J.

The State asserts by certiorari that the trial court exceeded its jurisdiction in dismissing a charge of operating a motor vehicle under the influence of alcohol in violation of § 321.281, The Code 1977, against defendant Harlan Curtis Risdal. We agree and sustain the writ of certiorari.

Risdal was charged by information with three separate OMVUI offenses. He received a deferred sentence on the first charge and was acquitted of the second charge by a jury on January 16, 1978. On February 6, 1978, the date set for trial on the third charge, both sides appeared and were ready to proceed to trial. However, the only jury panel available was the same panel from which the jury had been selected for Risdal's January 16, 1978 trial resulting in his acquittal. From the record it appears that an impartial jury could not have been selected from that panel. Risdal's counsel objected to the panel of jurors under rule 187(c) and (d), Rules of Civil Procedure, see §§ 779.1 and 779.3, the Code 1977. The trial judge sustained the challenge, overruled the State's motion for continuance until a different jury panel could be summoned, [1] and dismissed the charge against Risdal, apparently pursuant to its powers under § 795.5, The Code.

Both sides concede that on February 6, 1978, the case could not proceed to trial without exhausting the jury panel by challenges for cause under § 779.5, The Code. The State contends that dismissal of the case was not an alternative available to the trial court when the defendant's right to a speedy trial would not be jeopardized by a delay. Cf. State v. Hines, 225 N.W.2d 156 (Iowa 1975) (delay in trial for lack of sufficient jurors would extend beyond 60-day limit).

The trial judge spoke by phone with the presiding Criminal Law District Judge, who suggested a one-day continuance to enable the court administrator to furnish a different jury panel. Delay of one day would still be well within the 60-day mandate of chapter 795, The Code. Witnesses who had been subpoenaed by defendant Risdal were not scheduled to appear until the following day. The granting of the State's motion for

---

[1] The jury panel in question was one of six sub-panels available in the Linn District Court for the months of January and February. It was the only sub-panel available on the date of trial.

continuance would not have prejudiced the defendant and would have protected the interests of the State from undue prejudice. See generally State v. Painter, 40 Iowa 298 (1875) (continuance requested to secure key witness).

A dismissal under § 795.5, The Code, must be "in the furtherance of justice", and should be entered only after each side has had a fair opportunity to present its case. See In re Judges of Cedar Rapids Mun. Court, 256 Iowa 1135, 130 N.W.2d 553 (1964). We find that the trial court abused its discretion in dismissing the case against Risdal rather than taking any of the alternatives available to it under the chapters concerning jury selection. The writ of certiorari is sustained and the case against Harlan Risdal is ordered reinstated.