

IN THE COURT OF APPEALS OF IOWA

FILED

JAN 29 1985

CLERK SUPREME COURT

STATE OF IOWA,)

Plaintiff-Appellee,)

Filed January 29, 1985

vs.)

408

KENNETH ALLAN FRAZIER,)

4-459
83-1125

Defendant-Appellant.)

Appeal from the Iowa District Court for Woodbury County - James P. Kelley and Michael S. Walsh, Judges; William E. Adams and John M. Fachman, District Associate Judges.

Defendant appeals from his convictions for possession of a controlled substance and possession of a controlled substance with intent to deliver in violation of Iowa Code sections 204.401(3) and 204.401(1), respectively.
AFFIRMED.

Charles Harrington, Appellate Defender, and Fern S. Shupeck, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Steven K. Hansen, Assistant Attorney General, for plaintiff-appellee.

Heard by Donielson, P.J., Hayden, and Sackett, JJ.

HAYDEN, J.

Defendant appeals from his convictions for possession of a controlled substance and possession of a controlled substance with intent to deliver in violation of Iowa Code sections 204.401(3) and 204.401(1), respectively. Defendant asserts: (1) he was denied his right to a speedy trial under Iowa Rule of Criminal Procedure 27(c); (2) the trial court erred in denying his motions to suppress evidence allegedly illegally seized; (3) he was denied a fair trial due to prosecutorial misconduct during the cross-examination of two defense witnesses; and (4) there was insufficient evidence to find defendant guilty of possession with intent to deliver.

Our review of criminal proceedings is ordinarily on assigned error; but we make an independent evaluation of the totality of the circumstances on issues involving the violation of basic constitutional safeguards. State v. Cuevas, 322 N.W.2d 910, 911 (Iowa Ct. App. 1982).

I. Speedy Trial. Defendant was arraigned on the misdemeanor possession charge on March 31, 1982, after a search of his house on December 10, 1981, produced amphetamines. When defendant was arrested on the misdemeanor charge he was found with additional amphetamines. This resulted in his arraignment on the felony charge of possession with intent to deliver on July 26, 1982. Pursuant to the custom in Woodbury County, the felony charge was pending before the district court and the misdemeanor charge was transferred to the associate district court.

Trial on the misdemeanor charge was repeatedly continued for various reasons. Defendant concedes that he agreed to continue the case to February 15, 1983. The trial court granted four additional continuances in 1983 on February 15, March 15, April 11, and May 26. On June 2 defendant moved to dismiss the misdemeanor charge because it had not been tried within one year. The motion was overruled.

Iowa Rule of Criminal Procedure 27(c) provides:

All criminal cases must be brought to trial within one year after the defendant's initial arraignment pursuant to R. Cr. P. 8 unless an extension is granted by the court, upon a showing of good cause.

A defendant may waive the requirement of trial within one year of arraignment by requesting or agreeing to continuances. State v. Magnuson, 308 N.W.2d 83, 85 (Iowa 1981). An attorney acting within the scope of his or her authority may also waive a defendant's statutory speedy trial rights. State v. LeFlore, 308 N.W.2d 39, 41 (Iowa 1981).

Defendant admits that he agreed to continue the case to February 15 to secure a ruling on his motion to suppress in the felony case which was based on the same argument as his motion to suppress in the misdemeanor case. Defendant contends, however, that he did not agree to any further continuances because the ruling on the motion to suppress in the felony case was filed on February 7. The State argues that defendant agreed to all of the continuances in order to await the ultimate disposition of the related felony charge.

The State introduced the affidavit of Ms. Peggy Pinder, an assistant county attorney who prosecuted defendant's misdemeanor case. She stated that it is the practice in Woodbury County to defer prosecution of a misdemeanor related to a felony in the expectation that the felony disposition will include the misdemeanor. She said it is customary for the county attorney or the judge to call a defense attorney to secure consent. She maintained she would not have represented to the court that the defendant agreed to the continuance if he had not in fact agreed. Although she did not have specific records, she stated she recalled talking to Stephen Paragamian of the public defender's office numerous times and each time he agreed to jointly move for a continuance due to the pending felony.

It appears from the record that defendant was represented by two attorneys from the public defender's office. Mr. Paragamian's affidavit stated that he had

been contacted by Ms. Pinder and Judge Fachman several times and had agreed to a continuance in February "in order to first see what disposition would be on another charge Mr. Frazier is facing, a charge of Possession With Intent to Deliver, a Felony." He did not recall agreeing to any continuance after February although his telephone log reflected a call from Ms. Pinder on March 9 concerning defendant.

The other attorney representing defendant was Michael Hobart. His affidavit states that he did not agree to any continuances beyond February 15 and did not ever intentionally give the impression that he wanted the felony charge disposed of prior to the misdemeanor charge.

We conclude there is substantial evidence to support the trial court's finding that defendant, through one of his attorneys, Mr. Paragamian, agreed to continue the case past the one year period and, therefore, waived his right to be tried within one year. Once defendant asserted his right to a speedy trial he was tried within a reasonable period.

II. Motions to Suppress. Defendant argues that the trial courts in both cases erred in denying his motion to suppress evidence seized as a result of the search of his residence on December 10, 1981. Defendant contends that the warrant lacked probable cause and particularity, and that the search exceeded the permissible scope of the warrant.

Defendant first maintains that there was no probable cause to believe drugs were present at his residence since the police officer's application alleged that a reliable informant had purchased drugs from defendant "in the very recent past" and did not specify the date. While probable cause does not continue for an extended period of time in controlled substance cases, time alone is not conclusive and the staleness issue is resolved by consideration of all the factors present in the particular situation. State v. Paterno, 309 N.W.2d 420, 423-24 (Iowa 1981). The police officer testified that he did not put the date in the application because

he wished to preserve the confidentiality of the informant, but that he did reveal the date to the magistrate. Considering the facts of this case the "very recent past" is not so remote as to vitiate a finding of probable cause. See also State v. Birkestrand, 239 N.W.2d 353, 358-59 (Iowa 1976).

Defendant also attacks the warrant on the ground that "stimulant drugs" did not describe the items to be seized with sufficient particularity. Iowa Code section 204.206(5) lists four stimulants which are schedule II controlled substances. We believe this description was sufficiently particular. See State v. Hamilton, 236 N.W.2d 325, 328-29 (Iowa 1976).

Finally, defendant claims the officers exceeded the permissible scope of the search by seizing not only stimulant drugs but also guns, tools, and money. The State argues that the other items were properly seized under the plain view doctrine. In order for the plain view doctrine to apply it must be shown that: (1) the law enforcement officers were lawfully on the premises; (2) discovery of the evidence was inadvertent; and (3) the incriminating nature of the evidence was immediately apparent. State v. Davis, 228 N.W.2d 67, 70-71 (Iowa 1975). In United States v. Clark, 531 F.2d 928, 932-33 (8th Cir. 1976), the eighth circuit held that seizure of a pistol during a search for controlled substances was not justified under the plain view doctrine because its incriminating nature was not immediately apparent. The record in that case revealed no factual basis which would lead the officers to believe the pistol was contraband, there was no nexus between the pistol and the crime of unauthorized distribution of a controlled substance, and it was not until the serial number of the pistol was traced that the officers learned defendant might be guilty of illegal interstate transportation of a firearm and making false statements in connection with acquisition of a firearm. In contrast, in the present case the incriminating nature of the guns seized from defendant was immediately apparent since the officers knew defendant to be a convicted felon. The cash seized was stacked next to the drugs supporting an

inference that it was part of a drug transaction, and the tools had peculiar markings on them identical to tools that had been reported stolen. Therefore, this case is distinguishable from Clark and the seizure of the items can be justified under the plain view doctrine. Furthermore, of the items seized, only the drugs were admitted into evidence against defendant. None of the other items was ever referred to at trial except the cash which was stacked with the drugs. Therefore, even if seizure of the tools and guns was illegal, it was harmless since that evidence was not used against defendant in any way.

We conclude that defendant's motions to suppress were correctly overruled.

III. Prosecutorial Misconduct. The trial court in the felony case granted defendant's motion in limine and ordered the "state shall offer no evidence of Defendant's prior felony conviction during the trial of this matter" On redirect examination of defendant's wife, defense counsel inquired:

Q. Louisa, how do you happen to remember March 29 of 1982?

* * *

A. When I came home from work, well, then Kenneth came back; and I asked him where he had been. He said he had been in jail.

Immediately thereafter on recross-examination the prosecutor asked:

Q. Has he ever been in jail on other—

MR. HOBART: Excuse me, your Honor. This is inappropriate and—

THE COURT: Sustained.

The court denied defendant's motion for a mistrial based on the alleged prosecutorial misconduct.

We do not agree with the State's argument that the question was proper to test the witness's reason why she remembered the particular date. In view of the motion in limine, the prosecutor should have stayed away from the subject. However, the objection was made and sustained before the question was answered

or even completed. We do not find that this was so prejudicial as to deny defendant a fair trial.

Defendant also alleges prosecutorial misconduct in the cross-examination of defendant. The prosecutor asked if defendant was employed on March 29, 1982, to which defendant responded that he was not. The prosecutor then asked if defendant had been employed for two years preceding that date but withdrew the question after a defense objection. We do not see the relevance of defendant's prior employment record, but we conclude that defendant was not unduly prejudiced by the question.

IV. Sufficiency of the Evidence. Defendant argues that there was insufficient evidence to convict him of the felony of possession with intent to deliver a controlled substance. In reviewing a claim of insufficient evidence we consider all the evidence in the light most favorable to the State. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). Evidence is sufficient if it could convince a rational trier of fact that defendant is guilty beyond a reasonable doubt. Id. at 339.

Defendant claims there was insufficient evidence to show he was in possession of the controlled substance. The record shows Officer Curry made a visual inspection of the back seat of his car prior to arresting defendant pursuant to an arrest warrant on the misdemeanor charge. Immediately after defendant exited the squad car, Officer Curry noticed the tip of a brown paper sack between the seats. The sack contained nine packages of amphetamines. There was also evidence that the bag could have been concealed in defendant's pants and that defendant would have been able to push the bag between the seats of the squad car while Officer Curry was inventorying the contents of defendant's car. This evidence was sufficient to support the jury verdict.

AFFIRMED.