

STATE OF IOWA,

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Plaintiff-Appellee,

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Filed April 29, 1980

vs.

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BALDEMAR CAVAZOS,

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61689

Defendant-Appellant.)

Appeal from Muscatine District Court - R. K. Stohr, Judge.

Defendant appeals jury verdict finding him guilty of possession of a Schedule I Controlled Substance, marijuana, with intent to deliver in violation of section 204.401(1), The Code 1977, alleging trial court erred in overruling his motion to dismiss based on his claim he had been denied his right to a speedy trial. AFFIRMED.

Patrick J. Kelly of Davenport, Iowa; and Jorge Gomez, Jr. of Gomez, Feuerbach, May, Pries & Tobey, Davenport, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; Lona Hansen, Assistant Attorney General; and David Newell, Muscatine County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Defendant, Baldemar Cavazos, appeals jury verdict finding him guilty of possession of a Schedule I Controlled Substance, marijuana, with intent to deliver in violation of section 204.401(1), The Code 1977. He alleges trial court erred in overruling his motion to dismiss based on his claim he had been denied his right to a speedy trial. We affirm.

I. Procedural Background. On July 27, 1977, defendant was charged by county attorney's information for violation of section 204.401(1). He entered a plea of not guilty on August 12, 1977, and requested a speedy trial. Trial was set for September 13, 1977. Upon discovering the jury panel had been selected from a jury list compiled by utilizing improper standards, defendant, on September 8, 1977, filed a motion to strike the entire jury panel. After hearing, the motion was granted on September 14, 1977, and the jury commission was ordered to compile a new jury list.

The State filed a motion for continuance on September 20, 1977, which defendant resisted. Hearing was held September 27, 1977. Since the court was informed it would be at least ten days from that date before a new jury list could be prepared, trial court found the "motion was dictated by the exigencies of the circumstances" and granted the continuance. Believing it unnecessary at this stage of the proceedings, trial court made no finding of good cause.

The next day, September 28, 1977, defendant filed his motion to dismiss. He alleged denial of his right to speedy trial within sixty days from the date of his indictment as provided by section 795.2, The Code 1977, said period having expired on September 27, 1977. On October 5, 1977, trial court overruled defendant's motion, concluding the September 27th continuance had been granted for good cause attributable to defendant.

Trial was rescheduled for October 12, 1977. That trial date was cancelled, however, by order filed October 11, 1977, due to defendant's filing 1) a writ of certiorari to review trial court's overruling his motion to dismiss, and 2) a motion for continuance. The continuance was granted. Upon denial of the writ, trial was set for December 13, 1977, and defendant was convicted on December 14, 1977.

II. Right to Speedy Trial. Controlling law at the time of defendant's conviction required charges against defendant be tried within sixty days after indictment,¹ unless 1) the right was waived by defendant, 2) the delay was attributable to defendant, or

¹ Under the new criminal code provisions, this period has been increased to ninety days. Iowa R. Crim. P. 27(2)(b).

3) other good cause to the contrary was shown. Section 795.2, The Code 1977; State v. Ege, 274 N.W.2d 350, 354 (Iowa 1979). It is the State's duty, not defendant's, to prosecute timely and begin trial within this allowable period. State v. Lybarger, 263 N.W.2d 545, 546 (Iowa 1978).

As the facts indicate, the initial delay in trial was due to defendant's motion to strike the entire jury panel. However, we do not believe this per se renders the delay past sixty days attributable to defendant. The jury commission had compiled the jury list improperly, in part, by applying a test of good moral character. Defendant had every right to an impartial jury and to properly challenge composition of the list from which jurors were selected.

Nor can it be suggested defendant waived his right to a speedy trial. On the contrary, defendant clearly demanded exercise of his right. Consequently, we must determine whether other good cause for the delay exists.

On appeal, we do not review trial court's determination of good cause *de novo*. State v. Reynolds, 250 N.W.2d 434, 437 (Iowa 1977). In order to obtain a reversal, defendant must show trial court abused its limited discretion. Ege, 274 N.W.2d at 354.

Under section 795.2, good cause focuses on only one factor: the reason for delay. State v. Petersen, 288 N.W.2d 332, 335 (Iowa 1980). To determine sufficiency of the reason for delay we will consider the surrounding circumstances, including 1) length of the delay, 2) whether defendant asserted his right to a speedy trial, and 3) whether he was prejudiced by the delay. Id. at 334. Prejudice must be assessed in light of defendant's interest 1) to prevent oppressive pretrial incarceration; 2) to minimize anxiety and concern of the accused; and 3) to limit the possibility the defense will be impaired. Barker v. Wingo, 407 U.S. 514, 532, 92 S.Ct. 2182, 2193, 33 L.Ed. 2d 101, 118 (1972).

Applying these standards to the facts before us, we find defendant demanded exercise of his right to speedy trial when he entered his plea of not guilty, but due to lack of a properly constituted jury, trial was delayed approximately 15 days until October 12, 1977. However, we believe this case can be distinguished from State v. Hines, 225 N.W.2d 156 (Iowa 1975), wherein a delay of 15 days was held to be without good cause. Id. at 161. In Hines, the jury panel had been discharged by court order because an insufficient number of jurors were present for the trial of cases. The State made no showing, and did not contend, an adequate panel could not have been obtained from the existing jury list on short notice. The supreme court emphasized the district judge had statutory authority to order drawing of another jury panel or to call additional

petit jurors so a jury would be available for Hines' trial, but found trial court failed either to order a panel be drawn or to order additional petit jurors be called. The State made no immediate effort to procure a jury, but rather elected to bring Hines to trial after a new jury panel was selected for the next term, even though the statutory speedy trial deadline would have passed by that time. Thus, the State elected to breach the speedy trial deadline by intentional inactivity.

In the instant case, however, trial court ordered the entire jury list recompiled. Until this was done, there was no available list of persons from which jury panels could be selected in accordance with the law. The State immediately began the necessary steps to compile a new jury list and did not request a continuance until it appeared the jury commission could not finish this task before the September 27, 1977 speedy trial deadline. The commission told the trial court it would have the new list prepared but the clerk told trial court it would take several additional days after the new list was prepared to type up the jury ballots and place them in the jury barrel out of which the jury panel was selected. After trial court granted the motion for continuance, it advised counsel defendant's case would be put on the trial calendar as soon as the new jury panel was selected. Thus, we conclude good cause was shown.

We also note the delay was relatively short and arose out of a unique, nonrecurring event. See State v. Goff, 244 N.W.2d 579, 582 (Iowa 1976); Hines, 225 N.W.2d at 158. Moreover, defendant has not shown he, in any way, was prejudiced by the delay. Defendant cannot complain he was oppressively incarcerated prior to trial and as a result suffered anxiety. On the contrary, defendant refused pretrial release, indicating he desired to remain incarcerated. Nor does defendant allege his defense was impaired by the delay.

In light of these circumstances, we conclude the initial delay in trial until October 12, 1977, was insubstantial. Any further delay was due to defendant's own request for a continuance, which was granted.

Judgment of trial court is affirmed.

AFFIRMED.