IN THE COURT OF APPEALS OF IOWA

No. 0-737 / 00-0239
Filed February 28, 2001

FILED
FEB 28 2001
CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellant,

vs.

MARK HUGHES MARTINDALE,
Defendant-Appellee.

Appeal from the Iowa District Court for Woodbury County, Patrick McCormick, Judge.

The State appeals following the district court's dismissal of a trial information charging defendant-appellee Mark Hughes Martindale for the second time with a violation of Iowa Code section 321J.2(2)(c), a class "D" felony. The district court determined defendant had not been brought to trial within a year of his initial arraignment as required by Iowa Rule of Criminal Procedure 27(2) and the first information was dismissed by the State more than a year after its initial filing. The State contends the second dismissal was not warranted because (1) the district court lacked authority to dismiss the trial information for a violation of Iowa Rule of Criminal Procedure 27(2)(c) after the case was earlier dismissed in furtherance of justice; and (2) defendant waived his right to be brought to trial within a year of his initial arraignment. The issues the State now raises were not raised in the district court and are not preserved for appellate review.

AFFIRMED.

Thomas J. Miller, Attorney General, Cristen C. Odell, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Brigit Barnes, Assistant County Attorney, for appellant.

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson, Assistant State Appellate Defender, for appellee.

Heard by Sackett, C.J., and Vogel and Miller, JJ.

SACKETT, C.J.

The State appeals following the district court's dismissal of a trial information charging defendant-appellee Mark Hughes Martindale for the second time with a violation of Iowa Code section 321J.2(2)(c), a class "D" felony. The district court determined defendant had not been brought to trial within a year of his initial arraignment as required by Iowa Rule of Criminal Procedure 27(2) and the first information was dismissed by the State more than a year after its initial filing. The State contends the second dismissal was not warranted because (1) the district court lacked authority to dismiss the trial information for a violation of Iowa Rule of Civil Procedure 27(2)(c) after the cases were earlier dismissed in furtherance of justice; and (2) defendant waived his right to be brought to trial within one year of his initial arraignment. The issues the State now raises were not raised in the district court and are not preserved for appellate review. We affirm.

Defendant was alleged to have driven while intoxicated on March 20, 1998. A trial information was filed on March 30, 1998, charging defendant with a violation of section 321J.2(2)(c) and another charge which is not a subject of this appeal. Defendant was arraigned on March 31, 1998. On May 6, 1998, the defendant waived his right to a speedy trial. On May 28, 1999, defendant revoked the waiver only to again waive speedy trial on June 24, 1999, and move for a continuance. On August 19, 1999, some sixteen and one-half months following the filing of the initial trial information, the State moved to dismiss the charges alleging one witness had changed her story and two other witnesses had moved to Cedar Rapids, Iowa, and the State was not able to serve them.

The State asked that the action be dismissed in furtherance of justice. If there was a hearing, it was not reported. The district court dismissed the action the same day the motion was filed, finding only that the dismissal was in the furtherance of justice.

The State then filed a second trial information on October 21, 1999, charging defendant with the same crime. On January 14, 2000, the defendant moved to dismiss the charge contending that the State violated the defendant's right to speedy trial and that the State's main witness now had given a statement exonerating the defendant from the filed charge.

The State resisted the motion, contending (1) that the first dismissal was in furtherance of justice because two witnesses could not be located; (2) the dismissal was appropriate; and (3) the State was justified in proceeding with the second prosecution. The State further contended that in situations where a case was dismissed in furtherance of justice it was not required to file the second case within a year. In addition the State argued the one-year requirement of Iowa Rule of Criminal Procedure 27(2)(c) started from the date the second indictment was filed, which was October 22, 1999, and that year had not yet passed.

A hearing was held on January 18, 2000. The hearing was not reported. On January 25, 2000, the district court denied defendant's motion to dismiss under Iowa Rule of Criminal Procedure 27(2)(b) on the basis he had not been brought to trial within ninety days of the indictment. The district court then found that Iowa Rule of Criminal Procedure 27(2)(c) required defendant be brought to trial within one year after his initial arraignment unless an extension is granted by the court upon a showing of good cause. The district court correctly noted that

there was no showing of any extension of the one-year period. The district court, finding that more than one year had lapsed between the time the first charge was filed on March 31, 1998, and its dismissal by the State on August 19, 1999, dismissed the charge.

The State first contends the district court did not have authority to dismiss the second charge for a violation of Iowa Rule of Criminal Procedure 27(2)(c) because the first judge had dismissed the case in furtherance of justice. The State contends the second judge made a legal error in entering the dismissal. Our review on this issue is for correction of errors at law. *See State v. Mary*, 401 N.W. 2d 239, 241 (Iowa Ct. App. 1986).

The State argues on appeal that the first dismissal was a final judgment and was not subject to change by the second judge, challenges to the dismissal of the first charge should have been raised at the time of dismissal. The defendant contends this argument was not raised in the district court and consequently cannot be raised now.

The State contends this argument was preserved for review in its resistance and supplemental resistances to the defendant's motion to dismiss. We disagree. The argument was not raised in either the State's resistance or supplemental resistance to defendant's motion to dismiss. The district court did not specifically address the issue as it is now raised in the State's brief. The State made no filing seeking to have the district court reconsider any portion of its ruling dismissing the second filing.

Issues not raised before the district court cannot be raised for the first time on appeal. *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997); *State v.*

Wages, 483 N.W.2d 325, 326 (Iowa 1992). The issue now raised by the State not having been preserved, we have nothing on this issue to review.

The State next contends defendant waived his right to be brought to trial within one year as required by Iowa R. Crim. P. 27(2)(c).

"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." Iowa R. Crim. P. 27(2)(c). Like a statute of limitations, rule 27(2)(c) establishes an "outer limit" for trial. *State v. Hempton*, 310 N.W.2d 206, 208 (Iowa 1981). Once the one-year period has expired, the State must show either a waiver on the part of the defendant or good cause for the delay. *See State v. Miller*, 311 N.W.2d 81, 83-84 (Iowa 1981). The State has the burden of demonstrating good cause for the extension. *Miller*, 311 N.W.2d at 84. Under rule 27(2)(c) the burden is a heavy one. After the one-year period has lapsed, the State has the burden of showing "good cause" for the delay.

The district court found there was no extension requested or granted by the court in the first case and more than one year had passed since defendant's arraignment. The court further found there was no extension of the time granted nor was there a showing of good cause. Defendant again contends the error now raised was not preserved. The waiver claim was not made in either the State's resistance or its supplemental resistance. The defendant notes the State did not have the hearing on his motion reported and did not file a bill of exceptions.

Absent a transcript, we must accept the trial court's findings of facts as being supported by substantial evidence. *State v. Ruiz*, 496 N.W.2d 789, 791 (Iowa Ct. App. 1992). It is the State's burden to demonstrate waiver by defendant or good cause in order to be excused from the requirement to bring a case to trial within one year of the initial arraignment. *See Miller,* 311 N.W.2d at 83-84. The State in claiming error has an obligation to provide this court with a record that discloses the error claimed. *See State v. Ryder*, 315 N.W.2d 786, 788 (Iowa 1982); *State v. Mark*, 286 N.W.2d 396, 402 (Iowa 1979). There being no record the trial court's findings are considered to be supported by the evidence. *Ruiz*, 496 N.W.2d at 791. This issue was not raised and there is no record for us to review. The district court must be affirmed.

AFFIRMED.