IN THE COURT OF APPEALS OF IOWA

No. 6-603 / 95-1658

000435

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

TERESA LYNN LEHMAN,

Defendant-Appellant.

Appeal from the Iowa District Court for Boone County, Joel E. Swanson, Judge.

Defendant appeals from judgment and sentence, following a bench trial, entered upon her conviction for delivery of a controlled substance. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney General, and Steven J. Oeth, County Attorney, for appellee.

Considered by Habhab, C.J., and Cady and Huitink, JJ. Sackett, J., takes no part.

HABHAB, C.J.

On January 19, 1994, a confidential informant made a controlled buy from defendant Teresa Lynn Lehman. Lehman was not arrested at the time and no charges were filed. On January 18, 1995, a search warrant was executed on Lehman's residence and marijuana was seized. On January 19, 1995, law enforcement issued Lehman a citation for delivery of a controlled substance for her conduct on January 19, 1994, and possession of marijuana on January 18, 1995. She made her initial appearance on both charges and a preliminary hearing was scheduled.

On February 13, 1995, the State moved to dismiss without prejudice the charge for delivery of a controlled substance because it did not want to disclose the name of the confidential informant. On the same date, the court granted the motion pursuant to Iowa Rule of Criminal Procedure 27.1. Lehman pleaded guilty to the possession of marijuana charge and the court imposed a sentence on March 22, 1995.

On June 6, 1995, the State filed a trial information charging Lehman with delivery of a controlled substance for the January 19, 1994 controlled buy. Lehman filed a motion to dismiss for lack of speedy trial and speedy indictment. She argued the State's reason for the dismissal was a pretext because she did not ask for the identity of the confidential informant. She further argued the dismissal of the delivery charge was in exchange for her guilty plea to the possession of marijuana charge. The court denied the motion to dismiss and ultimately found her guilty after a bench trial.

Lehman appeals. She asserts the court improperly entered the February 13, 1995 order dismissing the charge for delivery of a controlled substance without prejudice without giving her an opportunity to be heard on the State's motion. She contends she was, as a result, denied consideration of her "substantive rights" and the court should have provided the reasons for the dismissal in its order. Lehman further asserts the court erred in failing to sustain her motion to dismiss because the State's true reason for the requested dismissal was to avoid the time constraints imposed by the speedy indictment rule. She argues, because she did not request the identity of the confidential informant, the State's reason for the dismissal was pretextual.

The State contends the issues relating to whether the court followed the proper procedures in granting the motion to dismiss are not properly preserved because Lehman did not file an appeal from the dismissal order. Alternatively, the State argues *State v. Brumage*, 435 N.W.2d 337 (Iowa 1989), does not require a defendant to be heard on the State's motion to dismiss, and any procedural errors regarding notice or the court's reasoning for the dismissal were cured at the hearing on Lehman's motion to dismiss. The State also contends Lehman has not shown bad faith by the State in requesting the dismissal.

Iowa Rule of Criminal Procedure 27(1) states, in pertinent part:

> The court, upon its own motion or the application of the prosecuting attorney, in furtherance of justice, may order the dismissal of any pending criminal prosecution, the reasons therefor being stated in the order and entered of record. . . . Such a dismissal is a bar to

> another prosecution for the same offense if it is a simple or serious misdemeanor; but it is not a bar if the offense charged be a felony or an aggravated misdemeanor.

There is language in *Brumage* that the State and the defendant are entitled to notice and an opportunity to be heard before the district court can dismiss charges pursuant to rule 27(1).

> No specific provision in rule 27(1) requires a trial court to give notice before entering a dismissal. However, our previous pronouncements leave little doubt that such notice is mandated. In regard to our rule's predecessor, we stated that prior to dismissal, "a fair opportunity *for each side* to present its case must be afforded" to provide a requisite "opportunity for each side to be heard."

Brumage, 435 N.W.2d at 340 (quoting *In re Judges of the Municipal Court*, 256 Iowa 1135, 130 N.W.2d, 553, 555 (1964))(emphasis added). We specifically recognized the State's right to such notice in *State v. Lundeen*, 297 N.W.2d 232 (Iowa App. 1980), holding that when a trial court considers the dismissal of a charge in the interest of justice, "fair notice . . . should [be] given to the *parties* and a full hearing held to permit them to argue the merits of dismissal or trial of the remaining charges." *Lundeen*, 297 N.W.2d at 235; *see Brumage*, 435 N.W.2d at 340.

But in both *Brumage* and *Lundeen* the trial court, without application for dismissal by the prosecuting attorney, ordered on its own the dismissal of criminal charges. The same is true in the case of *In re Judges of the Municipal Court*, 256 Iowa 1135, 130 N.W.2d 553 (1964). In each of those instances, the State appealed, claiming they were entitled to notice and hearing. The appellate court agreed.

Here, however, we have a case where the prosecuting attorney made application for the dismissal of the criminal charge. The question remains whether, under this circumstance where the prosecuting attorney makes application to dismiss a charge that he or she brought, Lehman is entitled to notice and hearing before the court can act on the dismissal application. For the reasons that follow, we need not address that question.

We are not convinced Lehman has preserved error on the issue she raises on appeal. Lehman was well aware of the February 13, 1995 dismissal of the delivery charge. She accepted that dismissal without complaint and, although the right of appeal was available, she did not avail herself of that right. *See* Iowa R. App. P. 101. There is merit in the State's suggestion that Lehman now has waived any right she may have to challenge that order. But, because we find Lehman was not prejudiced in any respect by the dismissal order, we will discuss the merits of the controversy.

Our review of a trial court's rule 27(1) dismissal is for abuse of discretion. *State v. Hartley*, 549 N.W.2d 794, 795 (Iowa 1990). Whether the case is dismissed on application of the prosecuting attorney or the court's own motion, we believe the following from *Lundeen* is instructive:

> Trial court is vested with the discretion to dismiss, upon its own motion, any pending criminal prosecution in the furtherance of justice. Iowa R. Crim. P. 27(1). This exercise of discretion is subject to only a limited review on appeal, not review de novo. *State v. Gartin*, 271 N.W.2d 902, 910 (Iowa 1978). To secure reversal, the State must show trial court abused its discretion. *Id.* To accord trial court proper

> deference, we consider ". . . [that] court . . . [to be] in as good or better position than the appellate court to make a determination in accordance with the demands of justice." *Id.*
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> > [T]he decisions of the trial court are cloaked with "a strong presumption in [their] favor," and "[u]ntil the contrary appears, the presumption is that the discretion of the [trial] court was rightfully exercised." . . . [T]o overcome this presumption of regularity requires an affirmative showing of abuse and the burden of so showing rests upon the party complaining.
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> > This burden is heavy, indeed, for it can only be sustained by showing abuse *and* prejudice. In the words of a leading treatise on discretion: ". . . The action complained of must have been unreasonable in the light of attendant circumstances -- the discretion must have been exercised for *reasons clearly untenable* or to an extent clearly *unreasonable* [and] the action must have resulted *prejudicially* to the rights of the party complaining. Without a union of these conditions, the ruling will stand; and they concurring, it is seldom that a reversal is refused."
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> *Gartin*, 271 N.W.2d at 910-11 (quoting Donahoo, *The Scope of Judicial Discretion in the Iowa Criminal Trial Practice*, 58 Iowa L. Rev. 1023, 1024 (1973) (emphasis in original)).

Lundeen, 297 N.W.2d at 235.

Lehman argues as the district court failed to afford her notice and an opportunity to be heard at the time of the dismissal, it failed to consider her "substantive rights." *See Brumage*, 435 N.W.2d at 341. Lehman further contends the State's dismissal and subsequent reinstatement of the delivery charge was pretextual and constituted a bad faith attempt on the part of the State to avoid speedy indictment requirements. In support of this contention, she points out she never requested the identity of the confidential informant.

The State contends Lehman has not met her burden of showing she was prejudiced. As noted in the previous citation, in addition to showing an abuse of discretion, prejudice must also be established. This the defendant has failed to show.

The district court fully considered Lehman's allegations of bad faith in consideration of her motion to dismiss the charge before trial. In rendering its decision, the court explained its reasons for denying the motion:

> [T]he State's application to dismiss the charge . . . recited adequate reasons, that being the State's not wanting to disclose the identity of the confidential informant, the Defendant's speedy trial rights have not been prejudiced, and the record in Cause No. 10758, in particular the transcript of the guilty plea proceedings does not reveal that the Defendant relied on any promises, plea bargains, in regard to the dismissed charge . . . during her decision and ultimate plea of guilty to possession of marijuana.

After a careful review of the record, we find Lehman was not prejudiced in any respect by the dismissal of the delivery charge. We affirm the district court's judgment and sentence. The district court afforded Lehman a full opportunity to be heard in consideration of her motion to dismiss. Lehman has failed to show that she was in any way prejudiced by the district court's dismissal order.

AFFIRMED.