IN THE COURT OF APPEALS OF IOWA

No. 0-308 / 99-613
Filed September 27, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KRISTI D. HAMILTON
A/K/A KRISTI MORRISON,
Defendant-Appellant.

FILED
SEP 27 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Joel D. Novak (trial and sentence) and Robert J. Blink (motions), Judges.

Kristi Hamilton appeals her convictions and sentences following a jury trial for two counts of theft in the first degree. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Cristen C. Odell, Assistant Attorney General, John P. Sarcone, County Attorney, and Odell McGhee, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Mahan and Zimmer, JJ.

HUITINK, P.J.

Kristin Morrison appeals her conviction of two counts of first-degree theft. Morrison contends she was denied her statutory right to a speedy trial and the district court was accordingly obliged to dismiss the State's charges against her. She alternatively seeks a new trial citing the district court's failure to exclude documentary evidence as a sanction for the State's failure to comply with a pretrial order and subsequent admission of this evidence over her hearsay objection.

I. Background Facts and Proceedings.

Morrison was charged with these offenses in an indictment returned on June 24, 1998. In a pretrial order issued on August 20, 1998, trial was scheduled for September 14, 1998. This order also noted Morrison's anticipated motion to continue the September 14 trial date and the parties' stipulation concerning production of all documentary evidence the State intended to offer at trial.

Morrison did not move to continue the September 14 trial as anticipated by the pretrial order. The State, however, moved to continue the trial on September 11, citing unavailability of the complaining witnesses for trial. On September 14 the district court issued an order continuing Morrison's trial until September 21, 1999. On the same day, Morrison's attorney received 1134 pages of documents from the State in response to the discovery provisions of the August 20, 1998, pretrial order.

On September 16, 1998, Morrison filed an application for sanctions citing the untimeliness and inadequacy of the State's compliance with the pretrial order.

Following a hearing, the court found the State's production of its entire file rather than its intended exhibits violated the discovery provisions of the pretrial order. The court also noted the untimeliness of the State's response, five days before trial, and resulting unreasonable burden imposed on Morrison's counsel. The court chose not to impose Morrison's requested exclusionary sanction but instead ordered the State to pay the costs of reproducing the exhibits and offered to continue the trial to a date preferred by Morrison's attorney. As a result, the trial was continued until November 2, 1998.

Morrison subsequently moved to dismiss, claiming her case was not brought to trial within ninety days following her indictment as required by Iowa Rule of Criminal Procedure 27(2)(b). Following a hearing on Morrison's motion to dismiss, the court found that any delay in reaching Morrison's case for trial was attributable to both parties. Morrison's motion to dismiss was therefore denied.

Morrison's case was reached for trial in February 1999. As noted earlier, she was convicted of two counts of first-degree theft resulting in this appeal.

II. Speedy Trial.

A defendant in a criminal case must be brought to trial within ninety days from the date of indictment. Iowa R. Crim. P. 27(2)(b). In the absence of a waiver of this right, delay attributable to the defendant, or other good cause, failure to bring the defendant to trial within the time required necessitates dismissal of the indictment. *State v. Orte*, 541 N.W.2d 895, 898 (Iowa App. 1995); *State v. Hamilton*, 309 N.W.2d 471, 475 (Iowa 1981).

It is the State's duty to effectuate the rule requiring trial within ninety days, absent good cause. *State v. Hines,* 225 N.W.2d 156, 158 (Iowa 1975). Moreover, once the ninety-day period expires, the burden remains on the State to establish an exception to the ninety-day rule. *Orte*, 541 N.W.2d at 898.

The critical factor in the "good cause" analysis is the reason for the delay. *State v. Petersen*, 288 N.W.2d 332, 335 (Iowa 1980); *Orte*, 541 N.W.2d at 898; *State v. Searcy*, 470 N.W.2d 46, 47 (Iowa App. 1991). Other factors such as the length of the delay, whether the defendant was prejudiced, and whether the defendant asserted his or her right to a speedy trial also bear on the inquiry when the reason for the delay is weak. *State v. Bond*, 340 N.W.2d 276, 279 (Iowa 1983); *Petersen*, 288 N.W.2d at 335.

A defendant has no duty to bring himself to trial. *Hines*, 225 N.W.2d at 158. The defendant, however, may not actively or passively participate in events that delay his trial and then take advantage of a delay to avoid prosecution. *Orte*, 541 N.W.2d at 898.

Our scope of review for speedy trial issues under Iowa Rule of Criminal Procedure 27(2)(b) is for correction of errors at law. *State v. Finn*, 469 N.W.2d 692, 693 (Iowa 1991). The ultimate question is whether the trial court abused its discretion within the parameters of the recognized exceptions to the speedy trial mandate. *State v. Olson*, 528 N.W.2d 651, 653 (Iowa App. 1995).

Both sides blame the other for the events that delayed Morrison's trial. The State cites Morrison's initial intention to move for a continuance and failure to either act on it or promptly inform the State of her contrary intentions.

Morrison's failure to timely obtain the requested documents through the State's open file policy is cited as an additional factor contributing to the delay. Morrison attributes any delay to the State's failure to subpoena witnesses for the September 21 trial date and discovery abuses.

Our review of the record discloses evidence supporting the claims made by both sides. After considering this evidence the district court concluded:

> I think much of this whole situation derived because of lack of communication, disagreement, and lack of specificity in communications between counsel and by virtue of the pretrial conference order.

We, like the district court, conclude the resulting misunderstanding concerning discovery matters and the trial date provide good cause for delaying Morrison's trial. *See Petersen*, 288 N.W.2d at 335 (honest misunderstanding between counsel constitutes good cause for delay). We affirm on this issue.

III. Sanctions.

When a party fails to comply with a discovery order, the court may "order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing any evidence not disclosed, or it may enter such other order as it deems just under the circumstances." Iowa R. Crim. P. 13(6)(c); *State v. Veal*, 564 N.W.2d 797, 810-11 (Iowa 1997). In choosing a sanction, the trial court must consider: "(1) the circumstances surrounding the violation; (2) the prejudice, if any, resulting from the violation; (3) the feasibility of curing any prejudice; and (4) any other relevant consideration." *State v. Brown*, 397 N.W.2d 689, 698 (Iowa 1986). Here, again, the standard of review is abuse of discretion. *State v. Leto*, 305 N.W.2d 482, 489 (Iowa 1981).

We reach the same dispositive conclusion on this issue. The discovery dispute in this case also finds its origin in an honest misunderstanding between counsel. Under these circumstances, the sanctions imposed fell well within the rules and were not unreasonable. Because the district court did not abuse its discretion under the rule, we choose not to interfere.

IV. Hearsay Objection.

At trial the State offered records from the defendant's bank to prove its theft case against Morrison. Morrison objected claiming these records were inadmissible hearsay and that they did not fall within the business records exception to the hearsay rule. Appellate review of evidentiary rulings is for correction of errors at law. Iowa R. App. P. 4.

Iowa Rule of Evidence 803(6), the business records exception to the hearsay rule, provides as follows:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and the regular practice of that business activity was to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Admissibility under this rule is based on the guarantees of reliability and trustworthiness usually associated with business records. *State v. Propps*, 376 N.W.2d 619, 620 (Iowa 1985) (citing C. McCormick, Evidence § 306, at 720 (2d ed. 1972)). The element of unusual reliability of business records is said

variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation. McCormick §§ 281, 286, 287.

Morrison asserts the trial court erred in not excluding this evidence. In making this argument, Morrison asserts the business records exception only applies to business records of the defendant, and thus the business records of the bank should have been excluded.

The State correctly notes Morrison's mistaken interpretation of rule 803(6). Admissibility under this rule is premised on guarantees of reliability and trustworthiness. *Propps,* 376 N.W.2d at 620. There is nothing in the rule limiting admissibility to business records owned by the defendant. The district court is also affirmed on this issue.

The judgment of the district court is affirmed in its entirety.

AFFIRMED.