FILED
MAY 22 1984
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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| **STATE OF IOWA,** | ) | |
| Plaintiff-Appellee, | ) | Filed May 22, 1984 |
| vs. | ) | |
| **LAURENCE KARL BURGIN,** | ) | 4-137 / 83-605 |
| Defendant-Appellant. | ) | |

Appeal from the Iowa District Court for Linn County - Ansel J. Chapman, Judge.

The defendant appeals from his conviction, following a jury trial, for burglary in the first degree, contending the trial court erred in denying his two motions to suppress. AFFIRMED.

LuAnn White, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Marcia Mason, Assistant Attorney General, for plaintiff-appellee.

Heard by Snell, P.J., and Schlegel and Sackett, JJ.

Defendant Laurence Karl Burgin was found guilty by a jury of burglary in the first degree. On appeal, he challenges the trial court's denial of two motions which he made to suppress all evidence relating to an allegedly improper "show-up" identification of him.

The defendant was picked up by police officers while hitchhiking, after a motorist reported a hitchhiker who had implicated himself in unspecified recent criminal activity. While the defendant was at the police station, but before his arrest, the motorist and a recent burglary victim both observed the defendant through a one-way mirror without the defendant's knowledge. The burglary victim identified the defendant as the burglar, and the motorist also identified him as the self-incriminating hitchhiker. The police then arrested the defendant and obtained a warrant to search his duffel bags. Property belonging to the burglary victim was found in the duffel bags.

The defendant filed a motion to suppress all evidence relating to the "show-up" identification of him at the police station and all evidence relating to the items seized from his duffel bags. The trial court overruled this motion to suppress. The defendant's initial trial attorney later sought and received permission to withdraw; newly appointed trial attorneys then filed a new motion to suppress the same evidence. The trial court overruled this second motion to suppress, relying on the findings and conclusions in the earlier ruling and also relying on the alleged untimeliness of the second motion to suppress.

The defendant contends the trial court erred by denying his second motion to suppress in partial reliance on the alleged untimeliness of that motion. He argues that the second motion to suppress prepared by the substituted attorneys could not have been filed within 40 days of arraignment, as required by Iowa Rule of Criminal Procedure 10(4), because his substituted attorneys were not even appointed until more than 40 days after arraignment. He contends the trial

court's reliance on the 40-day requirement of rule 10(4) had the effect of preventing his substituted attorneys from rendering effective assistance.

We find defendant's arguments to be without merit. Assuming, without deciding, that appointment of substituted attorneys constitutes good cause for late filing, the second motion to suppress still was filed too late to be considered timely. Substitute counsel was appointed January 21, 1983. The second motion to suppress was filed forty-two days later, March 4. Defendant was arraigned on October 5, 1982. There is no good cause shown for tardiness the second time. Defendant was represented by counsel during the entire time. A motion to suppress had been made by defendant's original counsel which was very similar to the second motion to suppress. Substitute counsel should not have required more than another forty days to file the second motion to suppress. We therefore decline to decide any issues raised by defendant concerning the second motion to suppress.

Regarding the trial court's denial of defendant's first motion to suppress, defendant asserts on appeal that the "show-up" identifications through a one-way mirror, which resulted in the arrest and the search warrant, were impermissibly suggestive and unreliable. He also contends the "show-up" identifications were performed in violation of his statutory and due process rights because the State did not comply with the procedures for "non-testimonial identifications" set out in Iowa Code chapter 810. He argues that these defects in the "show-up" identification taint the fruits of the resulting search as well as the evidence about the identifications themselves.

In criminal cases on issues involving violation of basic constitutional safeguards, we make an independent evaluation of the totality of the circumstances. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

Although a "show-up" identification may be inherently suggestive, it need not be deemed unnecessarily suggestive if there are substantially countervailing

policy considerations. State v. Washington, 257 N.W.2d 890, 894 (Iowa 1977). Evidence may be admitted "if, despite the suggestive aspect, the out-of-court identification possesses certain features of reliability." Id. After considering the reliability factors set forth in Neil v. Biggers, 409 U.S. 188, 199, 93 S. Ct. 375, 382, 34 L. Ed. 2d 401, 411 (1972), we find that the identifications in the instant case possessed those features of reliability. The burglary had occurred the day before defendant was identified by the victim and the same day the other witness had seen him.

> The whole future course of the police investigation depended upon a determination that defendant was, or was not, one of the parties to the crime. Far from encouraging false identification, the quick viewing of defendant by the witnesses would minimize such a possibility .... [A]n early identification procedure, if properly carried out, serves just as well to free a suspect from unjust suspicion as it does to fasten the accusation of guilt upon him.

State v. Wisniewski, 171 N.W.2d 882, 885 (Iowa 1969).

It is not necessary for us to determine whether the identification procedures were impermissible or unnecessary because we find them "to be reliable under the circumstances, such that there was not 'a very substantial likelihood of irreparable misidentification.' " State v. Mark, 286 N.W.2d 396, 405 (Iowa 1980) (quoting Manson v. Brathwaite, 432 U.S. 98, 116, 97 S. Ct. 2243, 2254, 53 L. Ed. 2d 140, 155 (1977)).

The State persuasively argues that Iowa Code chapter 810 did not apply because defendant voluntarily went to the police station and thus, there was not "seizure" within the scope of the Fourth Amendment. Because the State did not violate defendant's rights by failing to comply with chapter 810, and because the identification did not cause a substantial likelihood of irreparable misidentification, it was not necessary to suppress the evidence obtained pursuant to defendant's arrest. The trial court did not err in denying defendant's motion to suppress.

Finally, the defendant contends his initial trial attorney rendered ineffective assistance by failing to raise all available grounds in the first motion to suppress. We decline to decide this issue because we find inadequate evidence on the record regarding the attorney's performance.

AFFIRMED.