FILED
DEC 23 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Plaintiff-Appellant,

vs.

MICHAEL KINSUN LIU,

Defendant-Appellee.

Filed December 23, 1980

0-365
64706

Appeal from Monroe District Court - Dick R. Schlegel, Judge.

State appeals from trial court's dismissal of second information filed against defendant. AFFIRMED.

Frank J. Karpan, Albia, Iowa, for plaintiff-appellant.

John A. Pabst of Pabst & Pabst, Albia, Iowa, for defendant-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

The State appeals from trial court's dismissal of second information filed against defendant. The State argues that, under Iowa R. Crim. P. 27(1), dismissal of an aggravated misdemeanor for failure to provide a speedy indictment under Iowa R. Crim. P. 27(2)(a) does not bar refiling of the same charges. We affirm.

Defendant was arrested on September 8, 1979 for failure to stop at the scene of a personal injury accident, an aggravated misdemeanor under section 321.261, The Code. On November 2, 1979, more than 45 days after date of arrest, an information was filed against defendant charging him with this violation. Defendant filed a motion to dismiss on November 14 alleging a lack of speedy indictment as required by Iowa R. Crim. P. 27(2)(a). This motion was sustained on November 30; the State did not appeal that ruling. A second information charging defendant with the same offense was filed on December 14. Defendant again filed a motion to dismiss, arguing the same reasons as before. Trial court sustained this second motion on January 10, 1980, and this appeal followed.

Iowa R. Crim. P. 27(1) provides in relevant part as follows:

> The court, upon its own motion or the application of the prosecuting attorney, in the furtherance of justice, may order the dismissal of any pending criminal prosecution .... Such a dismissal ... is not a bar [to another prosecution for the same offense] if the offense charged be a felony or an aggravated misdemeanor.

Rule 27(2)(a) states in part:

> When an adult is arrested for the commission of a public offense ... and an indictment is not found within forty-five days, the court must order the prosecution to be dismissed, unless good cause to the contrary is shown or the defendant waives his right thereto.

The requirement contained in this latter rule applies in cases prosecuted on an information as well as on those in which an indictment is filed. State v. Schmitt, 290 N.W.2d 24, 25 n.1 (Iowa 1980).

The State argues that it is allowed to commence another prosecution under rule 27(1). This rule, however, does not apply when it is the defendant who files the motion to dismiss. This is evident from the first sentence of the rule and is confirmed in Manning v. Engelkes, 281 N.W.2d 7, 9 (Iowa 1979), where the court said:

> It is apparent that only the county attorney and the court may apply or move for dismissal under this rule. Manning, the defendant in the criminal prosecution, could not have moved for dismissal or joined in the state's motion under rule 27(1).

Thus, if defendant files a motion to dismiss, rule 27(1) is inapplicable.

It is uncontroverted that the State did not file the information within the 45-day limit established by rule 27(2)(a). Therefore, the trial court correctly dismissed the second information. While the State raised the question of good cause, claiming that the first information was filed late because the county prosecutor was required to undergo eye surgery, that contention was rejected in the first dismissal order. The State's failure to appeal that first dismissal precludes reconsideration of the good cause issue at this time.

AFFIRMED.