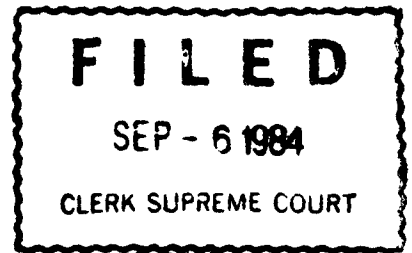


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA, )  
Plaintiff-Appellee, )  
vs. )  
STEPHEN MICHAEL STEPHENSON, )  
Defendant-Appellant. )

357  
Filed September 6, 1984  
4-188  
83-709

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Appeal from the Iowa District Court for Humboldt County— Louie F. Beisser, Judge.

The defendant appeals from his conviction of aiding and abetting in the false use of a financial instrument in violation of Iowa Code sections 703.1, 715.6 (1981). LIMITED REMAND FOR SPECIFIC PURPOSE OF MAKING AN ADEQUATE RECORD AS TO REASONS FOR THE FILING OF A WAIVER TO THE SPEEDY INDICTMENT RULE.

Charles Harrington, Appellate Defender and Linda Del Gallo, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Valencia Voyd McCown, Assistant Attorney General, for plaintiff-appellee.

Considered by Snell, P.J., and Hayden and Sackett, JJ.

SACKETT, J.

### **I. Nature of the Case**

The defendant, Stephen Michael Stephenson, appeals from a conviction for aiding and abetting in the false use of a financial instrument, in violation of Iowa Code §§703.1 and 715.6 (1981). Mr. Stephenson claims that he was denied effective assistance of counsel when his court appointed attorney failed to move for a dismissal of charges based upon the failure of the state to comply with the speedy indictment provisions contained in Iowa Rule of Criminal Procedure 27(2)(a). Defendant also claims that his attorney did not effectively represent him in that the attorney filed a waiver of Stephenson's rights to a speedy indictment after the forty-five (45) day deadline imposed upon the state by Rule 27(2)(a).

It is the state's position that the trial court record is not adequate to determine whether the defendant was denied effective assistance of counsel. Therefore, the state contends, the issue should be reserved until clarifications can be made in the record.

### **II. Facts and Trial Court Holding**

On December 3, 1982, defendant was arrested pursuant to a warrant issued on the basis of a complaint accusing the defendant of the crime of aiding and abetting in the false use of a financial instrument. The following day the defendant initially appeared before a magistrate, where an attorney was appointed to represent him.

It was on January 21, 1983, forty-nine (49) days after defendant's arrest, that the court appointed attorney filed a waiver of speedy indictment. The waiver indicated that the defendant was advised of his rights to a speedy indictment under the Constitution and the Iowa Rules of Criminal Procedure, and that he agreed to the waiver. The record does not reflect the specific reasons for the filing of the waiver.

On February 7, 1983, sixty-six (66) days after he was arrested, the defendant was charged pursuant to trial information with aiding and abetting in the false use of a financial instrument. The record does not specifically reveal why the state filed the trial information after the expiration of the forty-five (45) day statute of limitations period for filing of an indictment under Iowa Rules of Criminal Procedure 27(2)(a).

The defendant plead not guilty to the charge and a jury trial commenced on April 6, 1983. On April 8, 1983, the jury returned a verdict of guilty against Mr. Stephenson. On May 5, 1983, he was sentenced to a ten (10) year indeterminate prison term. The defendant filed his notice of appeal on May 13, 1983.

### **III. Issue Addressed on Appeal**

We will adopt the issue espoused by the defendant in this case. Namely, was defendant denied effective assistance of counsel when the attorney representing him before and during trial failed to move for a dismissal based upon the state prosecutor's failure to comply with the provisions of Iowa Rules of Criminal Procedure 27(2)(a), and also when defendant's attorney waived the defendant's right to a speedy indictment after the 45-day time limitation contained in Rule 27(2)(a) had expired.

### **IV. Applicable Law**

#### **A. Right to Counsel Guaranteed.**

A criminal defendant has a fundamental right to the assistance of an attorney. U.S. Const. Amend. VI. In order for the guarantee of a right to counsel by the Constitution to serve its purpose, defendants need to be represented by competent attorneys. McCorn v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L.Ed. 763, 773 (1970). This requirement is made for the purpose of ensuring a fair trial.

The reference point for judging ineffective assistance of counsel claims is whether an attorney's conduct so undermined the adversarial process that the trial

cannot be relied upon as having produced a just and fair result. Strickland v. Washington, 52 U.S.L.W. 4565, 4570 (1984). The proper standard for judgments as to attorney performance is that of reasonably effective assistance, and whether their performance fell within the normal range of competency for attorneys. See Trapnell v. United States, 725 F.2d 149, 151-52 (2nd Cir. 1983); See also State v. Massey, 207 N.W. 2d 777, 780 (Iowa 1973). The entire record must be evaluated in order to determine an attorney's effectiveness. The "entire record" involves not merely a review of the transcript of the trial, but also includes a consideration of the events that occurred prior to trial, ergo a totality of the circumstances is included in a determination of ineffective assistance of counsel. To warrant a conclusion that due process was denied, resulting in an unfair trial, the record must include an "affirmative factual basis demonstrating counsel's inadequacy of representation." In re Parke, 423 F2d 1021, 1025 (8th Cir. 1970). State v. Massey, 207 N.W. 2d 777, 780 (Iowa 1973).

The test for determining if a convicted defendant's claim that counsel's assistance was so defective as to require a reversal has two criterion. First, the defendant must show that counsel made error(s) so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment, i.e. that counsel's performance was deficient. Second, the defendant must show that the deficient performance prejudiced the defense. Id.; Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981).

B. No adequate record as to issue of prejudice.

Iowa Rule of Criminal Procedure 27(2)(a) provides:

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

Iowa R. of Crim. P. §27(2)(a)(1983).

The state, not the defendant, is responsible to see that prosecution for public crimes is timely and that an indictment is issued within the allowable period. See State v. Palimore, 246 N.W.2d 295, 297 (Iowa 1976). However, Rule 27(2)(a) allows for two exceptions to the rule that an indictment needs to be returned against a defendant within 45 days. One, where the State can show good cause for a delay, and/or two, where the defendant, himself, waives his right to a speedy indictment. An additional exception has been recognized as to the time limits of a similar statute where delay is attributable to acts of the defendant. See State v. Leonard, 240 N.W.2d 690, 691 (Iowa 1976) (construing Code of Iowa §795.2, regarding speedy trial).

In the present case there has been no claim made that acts of the defendant were responsible for the fact that no indictment was issued before the 45-day statute of limitations expired. Therefore, this discussion will be confined to the issues of good cause shown by the state and waiver by the defendant.

It is the contention of the state that no adequate record exists for a review of the issue of ineffective assistance of counsel. The defendant's claim may be heard on direct appeal if the record provides a factual basis demonstrating counsel's inadequate representation. Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981).

The state, in the appellate brief prepared for this case, goes to some lengths in attempting to explain why the defendant's attorney may have filed a waiver of the speedy indictment provisions. They state that defendant may have been aware of the existence of good cause, thereby making a motion to dismiss a frivolous action. They state that the waiver may have been filed in the face of plea negotiations, whereby the defendant could gain a "tactical advantage" by way of a concession in another matter.

In addition, the defendant's attorney also failed to move for a dismissal of the charges after expiration of the 45-day time limitation for returning an

indictment. Had the defendant's attorney not filed the waiver the state would have the burden of proving good cause as to why a dismissal should not have occurred.

Both the omission by the state to return an indictment within the 45-day statutory period and the specific act of defendant's counsel in filing a waiver of the right to speedy indictment were prejudicial to the defendant's cause absent the existence of good cause on the part of the state. To prove this as ineffective counsel, a defendant must show the existence of two conditions: "It must be shown that (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom." Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981).

As to condition (1) supra, the petitioner must shoulder the burden of proof to establish by a preponderance of the evidence a claim of ineffective assistance of counsel. Kellogg v. State, 288 N.W.2d 561, 563 (Iowa 1980). The test is whether under all the circumstances counsel's performance was within the range of normal competency. Cleesen v. State, 258 N.W.2d 330, 332 (Iowa 1977).

As to condition (2), the recent Supreme Court opinion in State v. Miles, 334 N.W.2d 231 (Iowa 1984) explains the standard for determining whether a petitioner has demonstrated prejudice. Prejudice cannot be found unless error constitutes a denial of the accused's fundamental right to a fair trial, a fundamental miscarriage of justice or some equivalent constitutional deprivation. Id. at 234. The test for prejudice suggests the proper allocation of the burden of proof on the issue of prejudice. In order to sustain that burden, the petitioner must show that ineffectiveness of counsel resulted in actual and substantial disadvantage to the course of his defense. This burden is of sufficient magnitude to discourage the filing of insubstantial claims and to focus the attention of the district court on the actual harm suffered by the petitioner as a result of his counsel's performance. At the same time, the burden does not require the petitioner to produce evidence

to which he is unlikely to have access. It also properly reserves for the state the ultimate burden of showing that any constitutional error that did occur was harmless beyond a reasonable doubt. Thus, even if the defense suffered actual and substantial disadvantage, the state may show in the context of all the evidence that it remains certain beyond a reasonable doubt that the outcome of the proceedings would not have been altered but for the ineffectiveness of counsel. (Emphasis in original.) Washington v. Strickland, 693 F.2d 1243, 1262 (5th Cir. 1982), cert granted, U.S. 103 S. Ct. 2451, 77 L. Ed. 1332 2d (1983)(Iowa has adopted the Washington expression of The U.S. Supreme Court's prejudice test found in United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596, 71 L. Ed. 2d 816, 832 (1982).

In applying these two conditions we have already considered and satisfied (1) above based upon the earlier discussion. Condition (2) is also satisfied in that the outcome of the proceedings against this defendant would have been different if the charges against him had been properly dismissed. However, we are unable to make a determination on the issue of whether the state has good cause for the violation of the speedy indictment provisions. They suggest possible plea negotiations as the reason for delay. Until the issue of good cause is resolved, we cannot make a final determination on the ineffective assistance of counsel issue. This case is remanded for the specific purpose for making a record of the reasons why a waiver was filed after the 45-day time limit had passed, and if good cause existed on the part of the state to warrant such waiver.

REMANDED TO MAKE A MORE ADEQUATE RECORD.