

FILED

APR 20 1988

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

289

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed April 20, 1988

vs.

)

ROBERT KYLE STONEMAN,

)

7-477
86-1787

Defendant-Appellant.

)

Appeal from the Iowa District Court for Black Hawk County (D7X006832),
Joseph C. Keefe, Judge.

Defendant appeals his conviction of third-degree sexual abuse. **REVERSED**
AND REMANDED FOR DISMISSAL.

Charles Harrington, Chief Appellate Defender, and James F. Whalen,
Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Bruce Kempkes, Assistant
Attorney General, for plaintiff-appellee.

Heard by Donielson, P.J., and Schlegel and Hayden, JJ.

SCHLEGEL, J.

The defendant appeals his conviction of third-degree sexual abuse, contending that: (1) the trial court violated his rights to adequate notice for preparation of a defense and due process by finding that the act of sexual abuse occurred on a date other than that allegedly selected by the child-victim; (2) his right to a speedy trial under Iowa Rule of Criminal Procedure 27(2)(b) was violated; and (3) his conviction was not supported by substantial evidence. On constitutional issues, we make an independent evaluation of the totality of the circumstances—the equivalent of a de novo review. See Taylor v. State, 352 N.W.2d 683, 684–85 (Iowa 1984). For other issues, our review is for the correction of errors at law. Iowa R. App. P. 4. We reverse and remand for dismissal.

Because we reverse on the speedy trial issue, we do not address the due process or sufficiency of the evidence questions. The defendant, Robert K. Stoneman, was charged with third-degree sexual abuse by a trial information filed on April 21, 1986. At arraignment, the defendant refused to waive his speedy trial rights. Stoneman's original defense counsel subsequently requested and received two continuances, the latter of which placed the trial date beyond the speedy trial period provided for in Iowa Rule of Criminal Procedure 27(2)(b). The record indicates that Stoneman wrote several letters to the court complaining of the delay in proceeding to trial with his case. The trial court later granted defense counsel's motion to withdraw and new counsel was appointed. Stoneman's new counsel filed a motion to dismiss on statutory speedy trial grounds. The trial court overruled the motion, stating that any delay was attributable to the defendant due to the continuances granted defense counsel. The defendant's bench trial commenced on September 23, 1986. The court found Stoneman guilty as charged. This appeal followed.

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

b. If a defendant indicted for a public offense has not waived his or her right to a speedy trial he or she must be brought to trial within ninety days after indictment is found or the court must order the indictment to be dismissed unless good cause to the contrary be shown.

The trial information charging the defendant was filed on April 21, 1986. Under rule 27(2)(b), Stoneman's speedy trial period ended on July 20, 1986. The defendant contends that the trial court's ruling that the delays in proceeding to trial were attributable to the defendant was erroneous because the court and defense counsel either knew or should have known that Stoneman objected to the delays and demanded a speed trial.

If trial is not commenced within the speedy trial period prescribed by rule 27(2)(b), the case must be dismissed unless one of three things has occurred: (1) the defendant has waived his right to a speedy trial; (2) the delay is attributable to the defendant; or (3) there is "good cause" for the delay. State v. Bond, 340 N.W.2d 276, 279 (Iowa 1983). The burden is on the State to show one of the three exceptions to the speedy trial rule. Id. The Iowa Supreme Court, in State v. LeFlore, 308 N.W.2d 39, 41 (Iowa 1981), stated that "the statutory right to a speedy trial under rule 27(2)(b) is not a personal right that can be waived only by the defendant. Defense counsel acting within the scope of his or her authority may waive this right on the defendant's behalf without the defendant's express consent." (Emphasis added.)

We address each of the exceptions to the speedy trial rule in turn. First, Stoneman did not waive his right to a speedy trial. Rather, at his arraignment he expressly retained his right to a speedy trial. Furthermore, Stoneman continued to demand that his case be resolved quickly as can be seen in the three letters he sent to the district court complaining of the delays in proceeding with his case and demanding a speedy trial.

There is also not substantial evidence to support a finding that the delays in trying the case are attributable to Stoneman. Defense counsel sought and received two continuances. The trial court states that "[a]n attorney must be given some measure of discretion as to when continuances are requested when he does not feel he is prepared to proceed to trial." While we agree that defense counsel should be allowed some discretion regarding continuances, we do not believe an attorney should be given the authority to have a case continued where the defendant is incarcerated, there is a lack of compelling reasons why the case cannot be brought to trial, and the defendant has voiced repeated demands to proceed with the case. We therefore find as a matter of law that the delays in this case cannot be attributed to Stoneman.

Finally, we address whether there is "good cause" for the delay. Again, there is not substantial evidence to support a finding of "good cause" for the delays. We base this conclusion on the fact that the defendant was an elderly man being incarcerated while awaiting trial, the length of the delays was significant, and there appears to be no compelling reason why defense counsel could not bring this case to trial using reasonable effort, especially where the defendant had expressly stated that he wanted to have the matter resolved as quickly as possible. Thus, none of the three exceptions to the speedy trial rule are applicable in this case.

Although defense counsel may waive the defendant's right to a speedy trial, even without the defendant's consent, when the attorney is acting within the scope of his or her authority, the circumstances of this case reveal that defense counsel was not acting within the scope of his authority. This conclusion is based on the defendant's demand at his arraignment to a speedy trial and the defendant's repeated objections to the court and his attorney about the delays in proceeding to trial. Where the defendant has voiced such an express

desire to proceed with his case and cease further delays, and none of the three exceptions to the speedy trial rule are applicable, we hold that the defendant's conviction should be reversed and the case remanded to the district court with instructions to dismiss the charge against the defendant.

REVERSED AND REMANDED FOR DISMISSAL.

Hayden, J., concurs; Donielson, P.J., dissents.

DONIELSON, P.J. (dissenting)

I respectfully dissent.

The evidence before the trial court was in dispute as to whether defendant wanted to go to trial within the ninety-day statutory speedy trial period. Defendant's former counsel testified at the hearing on his application to withdraw that defendant's source of unhappiness was attributable to his counsel not waiving a jury trial. Counsel also testified that defendant informed him he didn't really mean his complaints about the delays in going to trial and that defendant did not want to go to trial. Defendant contends otherwise. I find no reason to disregard the trial court's determination, nor do I find any compelling reason to take the word of defendant over that of his attorney.

In State v. LeFlore, 308 N.W.2d 39 (Iowa 1983), the defendant, whose trial was delayed several months, personally did not seek a continuance and, in addition, refused to sign a waiver form. The court in LeFlore stated that defendant's counsel's action in waiving defendant's right to a speedy trial and in moving for trial continuances was within the scope of his authority and thus defendant was bound by his counsel's action. Id. at 41. See also State v. O'Connell, 275 N.W.2d 197, 200-201 (Iowa 1979) (statutory right to speedy trial is not a personal right which can be waived only by the defendant).

I do not find that the trial court abused its discretion in denying defendant's motion to dismiss. Defendant's counsel's motions for continuance constitute "good cause" for the delay in bringing defendant to trial. Defendant's trial counsel should be given latitude in continuing the case if additional trial preparation is necessary.

Furthermore, I do not find defendant was prejudiced by the delay. As the defendant concedes, the length of the delay, two months, was not particularly long (cf. LeFlore, 308 N.W.2d at 40, wherein delay was five months and defendant

was not found to be prejudiced). Defendant's counsel was hopeful in successfully reaching a plea agreement during this period of time which would have benefited the defendant. In addition, I find defendant's counsel's motions for continuances to be considered strategic moves in light of the sensitivity of the charge (sexually abusing a young girl); it would appear to me to be advantageous to defendant to place as much time as possible between the alleged incident and the time of trial.