

FILED
OCT 21 1980

CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Plaintiff-Appellant,

)

Filed October 21, 1980

vs.

)

PAUL LARRY GRAFF,

)

0-219

64342

Defendant-Appellee.

)

Appeal from Sac District Court - R. K. Richardson, Judge.

The State appeals from trial court's dismissal of an information filed against defendant based on denial of speedy trial. - REVERSED AND REMANDED.

Lon R. Tullar, Sac County Attorney, Sac City, for plaintiff-appellant.

Gary Garrison, Des Moines, for defendant-appellee.

Heard by Oxberger, C.J., and Donielson, Shell, Carter and Johnson, JJ.

OXBERGER, C. J.

The State appeals from trial court's dismissal of an information filed against defendant, Paul Graff, based on denial of a speedy trial pursuant to Iowa R. Crim. P. 27(2)(b). We reverse and remand.

An information was filed on February 12, 1979, charging Graff with robbery in the first degree. On that same date, Graff moved for a mental competency examination, and the court ordered such examination to be held at a state mental facility. A hearing to determine the mental competency of Graff was held on April 30, 1979, and an order was filed on May 7, 1979, ruling Graff competent and setting arraignment for May 14, 1979. On May 11, 1979, Graff asked the court for removal of his counsel and appointment of new counsel. At arraignment the court appointed new counsel. (At this point in time 90 days had elapsed since the filing of information). The next formal action in this matter occurred on July 18, 1979, when Graff filed notice of taking oral depositions of State's witnesses. The depositions of witnesses were taken on July 27, 1979, with the exception of one witness who was then unavailable. Transcripts of the depositions were filed on September 4, 1979. The matter was scheduled for trial on September 25, 1979, by court order filed September 17, 1979. Graff moved to dismiss the information on the basis of denial of speedy trial on September 24, 1979; and the court, after hearing on the matter, ordered dismissal on September 27, 1979.

The State appeals that ruling and asserts good cause for the delay was shown. Our review is on error. State v. Lybarger, 263 N.W.2d 545 (Iowa 1978) (a decision applying the prior speedy trial statute § 795.2, The Code 1977). To secure a reversal the State must show good cause was established as a matter of law and trial court thereby abused its discretion. State v. Edwards, 279 N.W.2d 9, 10 (Iowa 1979). State v. Albertsen, 228 N.W.2d 94 (Iowa 1975).

The Iowa Supreme Court recently addressed the speedy trial issue in State v. Petersen, 288 N.W.2d 332 (Iowa 1980). Rather than the balancing of four factors as in a constitutional challenge, the focus is on only the reason for delay to assess the denial of this statutory right.¹ Id at 335. Other factors are considered as they bear on the sufficiency of the reason itself. To the extent that the delay has been minor, or the

¹ Clearly, no express waiver by Graff was obtained.

defendant has made no demand for speedy trial or has not been prejudiced, a weaker reason will be sufficient to show good cause. Id.

While the delay in this case was considerable from the time of information, much of that time was spent on behalf of Graff and is not included in the 90 day limit. The State and Graff agree the mental competency examination and hearing time suspended further proceedings pursuant to section 812.3, The Code. Therefore, no speedy trial imposition arose prior to the ruling on May 7, 1979. The State must show good cause for the delay after August 6, 1979, that date being 90 days from the competency determination.

On July 18, 1979, Graff filed notice to depose State's witnesses. The depositions were taken on July 27, 1979, with the exception of three witnesses who were unavailable. Following the depositions Graff's attorney communicated his desire to depose at least one of those witnesses when he became available. A letter to that effect was written on July 31, 1979. On August 21, 1979, the prosecutor informed Graff's attorney the witness was available. During this time, Graff's attorney, by phone, told the prosecutor he was not interested in an August 29, 1979, trial date. On September 10, 1979, Graff's attorney indicated he was soon to file pre-trial motions. By September 17, 1979, by which time no motions had been filed, the prosecutor asked the court to set the date for trial. During the time July 27, 1979, to September 17, 1979, Graff's attorney mollified the prosecutor into a position of justifiable inaction. We find the actions of Graff's attorney following the taking of depositions provided reason for the State to delay the proceedings beyond August 6, 1979. See State v. Petersen, 288 N.W.2d 332, 334 (Iowa 1980). We find the surrounding circumstances warrant a weaker reason for delay as in Petersen and that under the circumstances the foregoing reason constituted good cause.

We reverse the trial court's dismissal and remand the cause for further proceedings.

REVERSED AND REMANDED.

All judges concur, except Carter, J., who dissents.

CARTER, J. (dissenting)

I must dissent from the result reached in the majority decision. Our review of trial court dismissals based on speedy trial denials is not *de novo*. We can reverse only for an abuse of discretion. State v. Lybarger, 263 N.W.2d 545, 547 (Iowa 1978). I find no abuse of discretion in the present case. Indeed, the record appears to compel the result reached in the court below.

In order to sustain a reversal, the State must show that the trial court was compelled to find that the reason for the delay was such as to satisfy the "good cause" requirement of Iowa R. Crim. P. 27(2)(b). The reason for the delay is the only factor to be considered. State v. Petersen, 288 N.W.2d 332, 335 (Iowa 1980). In this regard, a showing of diligence on the part of the State is essential to a finding of good cause. Lybarger, 263 N.W.2d at 547. In the present case, the record on the motion to dismiss consists of the trial court papers and the conflicting professional statements of the attorneys for the parties. Diligence is a matter which ordinarily cannot be determined as a matter of law, thus, the trial court's determination of that issue should ordinarily not be disturbed.

The majority decision assumes that a new 90 day period for bringing defendant to trial commenced on May 7, 1979. I do not agree that this is necessarily so. In State v. Donnell, 239 N.W.2d 575, 579 (Iowa 1976), the court expressed the view that periods of time consumed by pretrial motion proceedings should not be inflexibly subtracted in determining the time in which a defendant must be brought to trial. I read this to mean that a pretrial delay for motion or competency examinations is justification for delay beyond the statutory speedy trial period only if such proceedings render it impossible or impracticable to commence the trial within this period. The trial court is ordinarily the best judge of the effect of such delays on its trial docket.

Even assuming, however, that the State had 90 days from May 7, 1979 in which to bring defendant to trial, it clearly failed to do so. Good cause for this delay simply does not appear in the record. In reviewing the various transactions which occurred in this case, I believe that the gap between the July 31, 1979 letter from defendant's attorney and the August 21 communication as to the availability of a witness is fatal to the State's argument. The circumstances in no way support a finding that defendant agreed

to any further delay of trial beyond August 6, 1979 (the date on which the majority concludes the 90 day period expired). Matters occurring after August 6, 1979 are not controlling because defendant's right to a dismissal had by this time already occurred. Lybarger, 263 N.W.2d at 548. I would affirm the trial court.