FILED
DEC 30 1981
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed December 30, 1981

vs.)

REESE EDWARD GARDNER,) 1-337/65690

Defendant-Appellant.)

Appeal from Black Hawk District Court - C. W. Antes and William Klotzbach, Judges.

Defendant appeals his conviction of second degree burglary in violation of sections 713.1 and 713.3, The Code, and the finding by a jury that he was an habitual offender under section 902.8, The Code. AFFIRMED.

Kjas T. Long of Gottschalk, Shinkle & Long, Cedar Falls, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Merle Wilna Fleming, Assistant Attorney General, for plaintiff-appellee.

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

DONIELSON, J.

Defendant appeals his conviction of second degree burglary in violation of sections 713.1 and 713.3, The Code, and the finding by a jury that he was an habitual offender under section 902.8, The Code. Defendant asserts that his case should have been dismissed under Iowa R. Crim. P. 27(2)(c) when he was not brought to trial, and the state failed to request an extension within one year of his arraignment. Defendant also asserts he was denied a fair trial on the habitual offender charge when he was tried before an all-white jury.

When a defendant alleges deprivation of a constitutional right we make an independent evaluation of the totality of the circumstances. State v. Harrington, 284 N.W.2d 244, 246 (Iowa 1979). We affirm.

I.

On January 23, 1979, defendant was charged by trial information with second degree burglary in violation of sections 713.1 and 713.3, The Code, and with being an habitual offender. Defendant failed to appear for trials set on March 6, 1979, March 20, 1979, and May 1, 1979. He was subsequently arrested on June 16, 1980, and the trial date was set for July 15, 1980. The state did not file a request for an extension of speedy trial time under Iowa R. App. P. 27(2)(c) before January 23, 1980. However, on July 10, 1980, the state filed a motion for a continuance due to the advanced pregnancy of the complaining witness. The court granted the continuance without a hearing on July 11, 1980. On July 15, 1980, defendant filed a motion to dismiss on grounds he was not brought to trial within one year of arraignment. The trial court denied defendant's motion on the grounds that defendant's repeated failure to appear constituted good cause for the delay in bringing him to trial.

Defendant's burglary case was tried to the court on August 5, 1980. The court filed its findings, conclusions, and judgment of guilty on August 29, 1980, and sentencing was set for September 26, 1980.

On September 19, 1980, defendant demanded a jury trial on the habitual offender charge. The following day an all-white jury was selected, and defendant challenged the jury panel because there were no blacks on it. Defendant asserted that the absence of blacks on the panel was evidence of discrimination because a recent newspaper article had stated that 15% of the Waterloo/Black Hawk County area is black. (On appeal, the state asserts the minority population in Black Hawk County is only 5.4%.) A discussion

was held out of the presence of the jury between the court, the county attorney, defendant, and defendant's attorney. The district court clerk was questioned, although not under oath, regarding the selection process. The court then overruled defendant's objection to the jury panel and the matter went to trial. The jury found defendant guilty as charged. On September 19, 1980, judgment was entered and defendant was sentenced to not more than a fifteen year term as an habitual offender. Defendant then filed this appeal.

II.

Defendant asserts he was denied a fair trial when he was not tried within one year of the filing of the trial information (filed January 23, 1979) and when the state's request for a continuance was granted ex parte without notice to the defendant. Defendant argues that since the state did not file for an extension before January 23, 1980, the charges should be dismissed under Iowa R. App. P. 27(2)(c). We disagree. State v. Miller, 311 N.W.2d 81, 84 (Iowa 1981) holds that it is proper for the trial court to grant an extension after the one-year period under rule 27(2)(c) has expired. In this case, the reason for delay beyond the rule 27(2)(c) time period was totally due to defendant's failure to appear. We find he has thereby waived his right to a speedy trial by failing to appear. See State v. Magnuson, 308 N.W.2d 83 (Iowa 1981). Good cause for the extension clearly existed in this case. We affirm the trial court.

III.

Defendant asserts he was denied a fair trial under the sixth and fourteenth amendments to the constitution of the United States when as a black man, he was tried before an all-white jury. We disagree.

In Apodaca v. Oregon, 406 U.S. 404, 413, 92 S. Ct. 1628, 1634, 32 L. Ed. 184, 193 (1972), in denying the defendant's challenge to the racial make-up of a non-unanimous jury, the Supreme Court stated:

> All that the Constitution forbids, however, is systematic exclusion of identifiable segments of the community from jury panels and from the juries ultimately drawn from those panels; a defendant may not, for example, challenge the makeup of a jury merely because no members of his race are on the jury, but must prove that his race has been systematically excluded.

The Apodaca standard was adopted by the Iowa Supreme Court in State v. Williams, 243 N.W.2d 658, 662 (Iowa 1976), where it was held that the right to an impartial jury under the state and federal constitutions "is violated when a systematic and intentional

exclusion of an identifiable group prevents a jury from being representative of the community." Id. Defendant had the burden to establish a prima facie case that the Black Hawk County jury selection procedure systematically excluded blacks, but failed to sustain that burden.

AFFIRMED.