FILED
JUN 4 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed June 4, 1986
vs.	)	329
DENNIS J. CROSS,	)	6-56
Defendant-Appellant.	)	84-1559

Appeal from the Iowa District Court for Black Hawk County (No. 22164-A) - L. D. Lybbert, Judge.

Defendant appeals from judgment and sentence entered on a jury verdict finding him guilty of robbery in the second degree in violation of Iowa Code section 711.3. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and Michael J. Laughlin, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Pamela Greenman Dahl, Assistant Attorney General; and Scott Lemke, Assistant County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson and Hayden, JJ.

DONIELSON, J.

Defendant, Dennis J. Cross, appeals from judgment and sentence entered on a jury verdict finding him guilty of robbery in the second degree in violation of Iowa Code section 711.3. Defendant contends the trial court erred and abused its discretion in denying his motion to dismiss based upon untimely prosecution. He contends the court denied him his right to speedy trial by granting a continuance without showing good cause and by failing to observe the provisions of Iowa R. Crim. P. 27(2)(b) as it relates to his right of speedy trial. The defendant claims he never waived his right to speedy trial. He requests that the denial of the motion to dismiss be reversed and the case be remanded to district court for dismissal of the prosecution.

On May 14, 1984, the defendant was charged with the crime of robbery in the first degree. During his initial court appearance on May 16, 1984, he entered a plea of not guilty and stood on his right to speedy trial. Trial was set for July 17, 1984. On June 11, 1984, the defendant's attorney filed an application to withdraw due to a conflict of interest. The withdrawal was granted the same day. On June 18, 1984, the defendant's new attorney made application for continuance of the trial date in order to prepare for trial. The continuance was sustained and the trial was rescheduled for August 7, 1984. On August 3, 1984, the court, on motion of the State, continued the defendant's trial date to August 14, 1984, when the case was finally brought to trial.

On August 12, 1984, ninety days had passed since the filing of the trial information. Since the defendant had not authorized his attorneys to move for any continuances that had been granted by the court, on August 14, 1984, the defendant's attorney made a motion to dismiss based upon Iowa Rule of Criminal Procedure 27(2)(b), stating that the defendant had not waived his right to speedy trial. The court heard and denied the defendant's motion to dismiss,

reasoning that two days of the trial delay was attributable to the defendant. The case proceeded to trial and the defendant was found guilty of robbery in the second degree and sentenced to serve not more than ten years in prison.

Iowa R. Crim. P. 27(2)(b) provides as follows:

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

If the defendant's trial does not commence within the ninety-day period, the trial court must dismiss the case unless "(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. Petersen, 288 N.W.2d 332, 335 (Iowa 1980); State v. Ege, 274 N.W.2d 350, 354 (Iowa 1979).

In denying the defendant's motion to dismiss, the trial court made the following findings of fact:

> [B]oth motions are overruled, and the basis for overruling the motions is that an examination of the court files reveals that some of the delay is attributable to the defendants. . . . And I believe in the case of Mr. Cross that there had been a trial setting within the time provided for speedy trial but a motion to continue was granted his attorney in order to have more time to prepare. And I find specifically in both cases that there has been more than two days delay attributable to the defendant.

Our review is whether the trial court abused its discretion by finding at most two days worth of delay were attributable to the defendant.[1] We cannot find abuse in the trial court's use of its discretion.

---

[1]The State maintained that "since the information was filed May 14, 1984, the 90-day period would have extended through August 12, 1984. However, August 12, 1984, was a Sunday. Therefore, the period would be extended to the next business day, which would have been Monday, August 13, 1984. Consequently, the delay in this case was only one day. Iowa Code § 4.1(22) (1983); State v. Holmes, 276 N.W.2d 823 (Iowa 1979); State v. Johnson, 216 N.W.2d 335 (Iowa 1974)." We do not address this argument because we find two days worth of delay was attributable to the defendant.

We assume, without deciding, the defendant did not waive his right to speedy trial. Nevertheless, the delay was attributable to defendant because defendant's original counsel withdrew due to a conflict of interest and newly-appointed defense counsel moved for a continuance on June 18, which was granted August 7.

This case is distinguishable from State v. Hunziker, 311 N.W.2d 692, 694 (Iowa Ct. App. 1981), where a one-day delay was sufficient to dismiss the case because the county attorney miscalculated a deadline. No similar facts are present here.

The August 3 order granting the State's motion for a continuance to reschedule trial to August 14 caused some delay, but this is not equivalent to stating it was the sole delay. Defendant's newly-appointed counsel was granted a continuance so trial was rescheduled from July 17 to August 7. This delay was sufficient to deny defendant's motion to dismiss. Accord State v. Moritz, 293 N.W.2d 235, 241 (Iowa 1980).

For these reasons we affirm.

AFFIRMED.