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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,) Filed February 26, 1980
vs.)
JESS ARTHUR FLACK,) 322
Defendant-Appellant) 62496

Appeal from Wapello District Court - Max H. Ruschmeyer, Judge.

Defendant appeals from conviction for O.M.V.U.I. in violation of section 321.281, supplement to the Code 1977, alleging trial court improperly denied his motion for continuance. Affirmed.

Alfredo G. Parrish, of Parrish & Del Gallo, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Lona Hansen, Assistant Attorney General, for plaintiff-appellee.

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

JOHNSON, J.

Defendant appeals from his conviction for O.M.V.U.I. in violation of section 321.281, supplement to the Code 1977, alleging trial court improperly denied his motion for continuance. We affirm.

Defendant was charged with O.M.V.U.I. in violation of section 321.281, supplement to the Code 1977, by trial information filed July 13, 1978. He was arraigned on July 24, 1978, at which time he was represented by counsel. Defendant's counsel demanded speedy trial and trial was scheduled for September 5, 1978. On August 25, 1978, a hearing was held on defendant's counsel's application to withdraw. The application was granted and, at that time, trial court ruled defendant was not indigent and thus not entitled to court-appointed counsel. However, trial court ruled the court would pay defendant's attorney's fees, but those fees would be taxed to defendant if he were convicted. On September 5, 1978, the scheduled date of trial, defendant appeared without counsel. He asserted he had unsuccessfully attempted to obtain counsel and requested a continuance for additional time to secure counsel. Trial court denied defendant's request for a continuance on the grounds defendant had failed to show good cause since he had ample time to obtain counsel. Trial court also found a continuance could not be granted in light of defendant's demand for speedy trial. Trial then proceeded with defendant unrepresented by counsel. He was found guilty as charged, fined $300 plus costs, given a suspended sentence of thirty days in the county jail, and denied driving privileges for 120 days.

I. Denial of Counsel. Defendant contends trial court's denial of his request for a continuance denied him protection of his constitutional right to representation by counsel. We cannot agree. On the contrary, upon consideration of the totality of the circumstances, we find defendant effectively waived that right. Defendant's own actions resulted in his failure to be represented by counsel on the date of trial. Brewer v. Williams, 430 U.S. 387, 402, 97 S.Ct. 1232, 1241, 51 L. Ed. 2d 424, 438 (1977); State v. Williams, 182 N.W.2d 396, 401 (Iowa 1970). Defendant also has no basis on which to complain he was deprived of any constitutional right to counsel by being forced to represent himself since no imprisonment was imposed as punishment. Scott v. Illinois, 440 U.S. 367, 373-74, 99 S. Ct. 1158, 1162, 59 L. Ed. 2d 383, 389 (1979).

II. Denial of Continuance. Generally, the granting or refusal of a continuance lies in trial court's broad discretion. State v. Kyle, 271 N.W.2d 689, 691 (Iowa 1978). We

will not interfere absent trial court's clear abuse. State v. Jacoby, 260 N.W.2d 828, 833 (Iowa 1977); State v. Hines, 225 N.W.2d 156, 160 (Iowa 1975). An abuse of discretion may occur when trial court bases the exercise of its discretion on an erroneous view of the law. Farley v. Glanton, 280 N.W.2d 411, 415 (Iowa 1979).

Although trial court apparently did not recognize defendant's request for a continuance constituted a waiver of his right to speedy trial,[1] this is not determinative in light of the court's statement on the record that a continuance was denied due to defendant's failure to show good cause.

Ten days prior to commencement of trial, defendant disagreed with his counsel as to how his rights were to be protected. Counsel withdrew at defendant's request. Defendant was admonished trial would proceed as scheduled. He made no attempt to inform trial court of any difficulty in obtaining alternate counsel and waited until the morning of trial to request a continuance. At that time, he indicated to trial court he wished to control his defense, which included a grand jury investigation of activities by the county attorney's office against him for the past thirty years. Such an attitude makes it evident why defendant's original attorney withdrew and why he was unable to enlist anyone else to take his case. Under these circumstances, trial court's judgment was both reasonable and supported by the record. No abuse of discretion occurred. See United States v. Sturgeon, 501 F. 2d 1270, 1275 (8th Cir.), cert. denied, 419 U.S. 1071, 95 S. Ct. 659, 42 L. Ed. 2d 667 (1974).

Judgment of trial court is affirmed.

AFFIRMED.

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

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[1] See State v. O'Connell, 275 N.W.2d 197, 200 (Iowa 1979); State v. Thomas, 275 N.W.2d 211, 214 (Iowa 1979).

SNELL, J. (dissenting)

I respectfully dissent. I would conclude that the trial court's denial of defendant's request for a continuance on the ground that a continuance could not be granted in light of defendant's demand for speedy trial constituted an abuse of discretion. It appears from the record that the trial court determined that defendant's right to a speedy trial was more important than his right to a continuance for the purpose of securing counsel and preparing for trial. The transcript reveals this pertinent colloquy:

> THE COURT: ... You have had ample time to acquire counsel, and you don't have it, and because you have not waived speedy trial, this Court will not grant you a continuance. You demanded a speedy trial; you are getting a speedy trial.
> THE DEFENDANT: When I asked for a speedy trial, I had counsel.
> THE COURT: Do you wish to withdraw your demand for a speedy trial?
> THE DEFENDANT: Well, I wish to ask the Court for more time to get sufficient counsel.
> THE COURT: The Court has explained to you that as long as your demand for speedy trial is of record, the Court cannot hear the case before the 90 days are up, and therefore, will not grant a continuance because of your demand for speedy trial.

It is apparent that defendant's desire and need for a continuance outweighed his desire and need for a speedy trial.

The above-quoted colloquy reveals the trial court concluded a continuance could not be granted because the court schedule was such that the case could not be rescheduled within the statutory speedy trial period. Delay attributable to the defendant constitutes good cause for delay beyond the statutory speedy trial period. State v. Ege, 274 N.W.2d 350, 354 (Iowa 1979); State v. Truax, 232 N.W.2d 861, 863 (Iowa 1975). Moreover, a defendant's motion for a continuance has been determined to constitute a waiver of the right to a speedy trial. State v. Thomas, 275 N.W.2d 211, 214 (Iowa 1979); State v. O'Connell, 275 N.W.2d 197, 200 (Iowa 1979). Consequently, not only did the trial court erroneously conclude that it was precluded from granting defendant's request for a continuance by defendant's assertion of his speedy trial right, but the trial court should have concluded that by requesting a continuance, defendant was waiving his right to a speedy trial.

The majority contends that the cause for the continuance arose out of the fault or negligence of the defendant, and thus, under the provisions of Iowa R. Crim. P. 18(2) incorporating Iowa R. Civ. P. 183(a), the trial court properly denied defendant's request

for a continuance. They assert that defendant's failure to obtain counsel was due to defendant's desire to control the defense of his own case, rather than allow counsel to conduct it in a manner that counsel may have determined to be more appropriate. However, with regard to whether the cause for the continuance was due to the fault or negligence of the defendant, there are no findings. The trial court did not inquire into the reasons for defendant's failure to obtain counsel, and, in fact, expressly stated that it would not so inquire. The trial court stated: "The Court does not know why they failed to represent you, and the Court will not go into that." Thus, while the record may provide some support for the majority's assertion, there is clearly no support for the conclusion that the trial court could have based its decision to deny defendant's continuance motion on that ground.

The trial court concluded that defendant had ample time within which to obtain counsel. However, the time period during which defendant was to obtain counsel included the Labor Day holiday. Furthermore, dereliction of defendant in obtaining counsel is only one factor to be considered in ruling on defendant's requests for a continuance; dereliction in and of itself is not sufficient to support the denial of a continuance. People v. Spurlark, 67 Ill. App. 3d 186, 202, 384 N.E.2d 767, 778 (1978); Cox v. State, 159 Neb. 811, 814, 68 N.W.2d 497, 499 (1955). If defendant did all he could do to obtain counsel, the trial court's denial of a continuance on the ground that he failed to do so is an abuse of discretion. People v. Willis, 6 Ill. App. 3d 980, 982, 286 N.E.2d 72, 73-74 (1972). The record does not show that defendant failed to make a good faith effort to obtain counsel.

For the foregoing reasons, I would hold that the trial court abused its discretion by denying defendant's request for a continuance, and that such abuse constituted reversible error.