IN THE COURT OF APPEALS OF IOWA

No. 6-578 / 95-0984

STATE OF IOWA,

Plaintiff-Appellee,

vs.

DALE DEAN VIERS,

Defendant-Appellant.

FILED

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CLERK SUPREME COURT

Appeal from the Iowa District Court for Black Hawk County, Robert E. Mahan, Judge.

Defendant was convicted of first-degree kidnapping in violation of Iowa Code sections 710.1 and 710.2 (1993), and second-degree sexual abuse in violation of sections 709.1 and 709.3. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant,

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney General, and Thomas J. Ferguson, County Attorney, for appellee.

Heard by Streit, P.J., and Vogel, J., and Schlegel, S.J.*

* Senior judge from the Iowa Court of Appeals serving on this court by order of the Iowa Supreme Court.

STREIT, P.J.

Defendant was convicted of first-degree kidnapping in violation of Iowa Code sections 710.1 and 710.2 (1993), and second-degree sexual abuse in violation of sections 709.1 and 709.3. On appeal, he contends he was denied his right to a speedy trial and the district court abused its discretion in denying his motion to dismiss. He also argues the court erred in denying his motion to suppress as the search warrant was not issued by a neutral and detached magistrate.

On July 4, 1994, a thirteen-year-old girl was bicycling from her residence to a library in Waterloo. While traveling under a viaduct, the defendant approached her and asked directions. Defendant grabbed the girl and sexually assaulted her. Two days after the assault the victim identified defendant, Dale Dean Viers, as her assailant from a photo lineup. The State applied for a search warrant to search defendant's residence. It sought a sweatshirt and sweatpants which matched the description of clothing the victim said her attacker had worn. The search warrant application was approved by Judge K. D. Briner.

The search warrant was executed and clothing matching that described by the victim was recovered. Defendant was arrested on July 6, 1994 and a written arraignment was filed July 21, 1994. On September 2, 1994, defendant filed a motion to suppress. He argued the search warrant had not been issued by a detached and neutral magistrate. The motion was denied. The jury found defendant guilty as charged.

Defendant filed a Combined Motion in Arrest of Judgment and for New Trial. The motion was orally denied at defendant's May 15, 1995, sentencing hearing. He was sentenced to life imprisonment on the kidnapping charge and a term not to exceed twenty-five years on the sexual abuse charge.

On appeal, defendant claims it was an abuse of discretion to deny his motion to dismiss and the charges against him should be dismissed. He contends the State did not have good cause to justify the delay. Defendant also argues the court erred in denying his motion to suppress and he is entitled to a new trial.

I. Right to Speedy Trial. Our scope of review for speedy trial issues under Iowa Rule of Criminal Procedure 27(2)(b) is for corrections of errors at law. *State v. Keys*, 535 N.W.2d 783, 786 (Iowa App. 1995). We recognize the trial court's discretion to refuse to dismiss within the limits of the exceptions to the speedy trial mandate. *See State v. Todd*, 468 N.W.2d 462, 470 (Iowa 1991). Thus, we ultimately look to whether the trial court abused its discretion. *Keys*, 535 N.W.2d at 786.

The right to a speedy trial is guaranteed by the Sixth Amendment of the United States Constitution, as well as Article I, section ten of our Iowa Constitution, and is now solidified by our rules of criminal procedure. *State v. Olson*, 528 N.W.2d 651, 653 (Iowa App. 1995). Rule 27(2)(b) requires that an accused be brought to trial within ninety days of indictment. Iowa R. Crim. P. 27(2)(b). The rule applies equally to charges brought by trial information. *State v. Clark*, 351 N.W.2d 352, 354 (Iowa 1984). If trial is not commenced within the ninety-day period prescribed by the rule, the indictment or information must be dismissed unless the defendant has waived the speedy trial right, the delay is attributable to the defendant, or good cause exists for the delay. *State v. Hamilton*, 309 N.W.2d 471, 475 (Iowa 1981).

Defendant argues the State did not have good cause for delay because the State failed to exercise due diligence in submitting its samples to the DCI and FBI for DNA testing. He contends the State failed to allow for sufficient time to conduct the tests and ensure the test results would be available prior to the speedy trial deadline.

The State filed a trial information on July 15, 1994, charging defendant with first-degree kidnapping and second-degree sexual abuse. Defendant filed his written arraignment on July 21, 1994, and demanded a speedy trial pursuant to Iowa Rule of Criminal Procedure 27(2)(b).

The ninety day speedy trial deadline was October 13, 1994. Trial was originally set for September 13, 1994, and was continued six times before it commenced on March 21, 1995. The trial was initially continued to October 4, 1994, to accommodate the trial preparation needs of both defendant and the State, although defendant indicated he was not waiving his speedy trial rights and was resisting the continuance "for the purposes of the record . . . ."

Defendant requested the second continuance from October 4 to October 11 to allow him to take a deposition and schedule an expert witness for trial. He indicated he was not waiving his right to a speedy trial but wanted to "bump" the deadline back by a week. The third continuance was requested by the State in order to allow it to complete DNA testing. Defendant resisted this request, demanded his right to a speedy trial, and filed a statement of readiness for trial. The State's request was granted and the trial was continued to November 15, 1994.

Following the grant of the third continuance, defendant filed his motion to dismiss on October 21, 1994. He argued he had been denied his right to a speedy trial pursuant to Iowa Rule of Criminal Procedure 27(2)(b). His motion to dismiss was denied November 14, 1994, and defendant subsequently requested three additional continuances of the trial date.

We have consistently held the critical factor in the "good cause" analysis is the reason for delay. *Olson*, 528 N.W.2d at 654; *State v. Searcy*, 470 N.W.2d 46, 48 (Iowa App. 1991). "Delay attributable to defendant may constitute statutory good cause preventing the State from carrying out its obligation to bring him to trial." *Keys*, 533 N.W.2d at 787 (quoting *State v. Donnell*, 239 N.W.2d 575, 579 (Iowa 1976)). A defendant may not actively participate in events which delay to terminate the prosecution. *State v. Finn*, 469 N.W.2d 692, 694 (Iowa 1991). We conclude some of the delay was attributable to defendant. The defendant requested four continuances over the course of proceedings in this case in addition to the first continuance allowed for trial preparation for both parties. We also find the third continuance requested by the State for DNA testing constitutes "good cause."[1] The results of DNA and other tests were needed by the State. The delay allowed was reasonable. Accordingly, we affirm the judgment of the district court.

II. The Search Warrant. Defendant argues Judge Briner was not a neutral or detached magistrate given his prior service as a public defender for defendant on unrelated burglary charges in 1990. Defendant filed his motion to suppress on September 2, 1994, more than 40 days past the day his written arraignment was filed. *See* Iowa R. Crim. P. 10(4), 11(1)(e). Defendants motion to suppress was untimely and therefore it is waived. *See State v. McCowen*, 297 N.W.2d 226, 227 (Iowa 1980).

AFFIRMED.

Vogel, J., concurs; Schlegel, S.J., dissents.

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[1] *See United States v. Drapeau*, 978 F.2d 1072 (8th Cir. 1992) (affirmed eight-week continuance granted by district court to allow government to obtain results of DNA profile test in prosecution for aggravated sexual abuse); *State v. Anderson*, 640 So.2d 1061 (Ala. App. 1994) (reversing grant of relief on constitutional speedy trial grounds where delay was attributable to State's error-ridden attempts to obtain DNA testing); *State v. Stroud*, 459 N.W.2d 332, 335 (Minn. Ct. App. 1990) (State's request for reasonable continuance which lasted sixty days to allow for DNA testing constituted good cause); *State v. Davis*, 903 S.W.2d 930, 936-37 (Mo. App. 1995) (nineteen-month delay caused by DNA testing did not constitute a denial of defendant's constitutional right to speedy trial); *People v. Fredericks*, 598 N.Y.S.2d 682, 685, 157 Misc.2d 822, 836 (1993) (court denied defendant's claim for relief on speedy trial grounds where the State had delayed its request for DNA testing until plea negotiations broke down).

SCHLEGEL, S.J. (dissenting)

I very respectfully dissent.

It is very difficult to take a dissenting position in this case, given the heinous crime that was found by the jury at trial to have occurred. It is tempting to disregard what I consider a violation of the rights of the defendant and merely concur in the opinion. Believing as I do, however, that the rules under which we operate protect not only the apparently guilty, but more importantly, the innocent, I must dissent to what I believe is a misapplication of the rule concerning defendant's right to a speedy trial. And, as repulsive as it may be to consider the dismissal of the charge of kidnapping in this case, it appears to me, in considering the authorities pertinent to this issue, that the majority is in error in affirming the trial court's ruling on defendant's motion to dismiss.

The majority correctly points out the speedy trial deadline was October 13, 1994, and that the trial was initially set for September 13, 1994. The trial was initially continued to October 4, 1994, to accommodate the trial preparation needs of both defendant and the State. Defendant, upon the granting of such continuance, specified he was not waiving his right to speedy trial. Had the trial taken place on October 4, 1994, it would have been timely and within the period prescribed by Iowa Rule of Criminal Procedure 27(2)(b). Defendant next sought and received a delay from October 4, 1994 to October 11, 1994, a period of one week, and still within the period allowed under the rule. Following that continuance, the State sought a continuance to complete DNA testing, which was resisted by the defendant, and the trial was continued to November 15, 1994, clearly beyond the period prescribed by the rule.

Defendant filed his motion to dismiss on speedy trial grounds on October 21, 1994. The motion was denied on November 14, 1994. At this point our analysis stops, for if the trial court was in error in allowing the State a continuance beyond this point, and thereby delaying the trial beyond the ninety days prescribed by the rule, defendant was denied a speedy trial and is entitled to a dismissal of the charges. It does not change the result that defendant thereafter requested and was granted three additional continuances. We must decide whether, at the point defendant filed his motion to dismiss on speedy trial grounds, he was entitled to a dismissal. We are not privileged to base our decision upon the result of the trial. We must decide the narrow issue before us. Was defendant, on October 21, 1994, entitled to a dismissal under the rule? It is immaterial for purposes of our analysis that defendant requested two continuances before the speedy trial deadline, one of which was a joint request with the State. He did not request that the time be extended beyond the deadline. His sole request for delay was for one week and only until October 11, two days before the commencement of trial. At no time before the deadline did he request a continuance past the ninety days prescribed by the rule.

Rule 27(2)(b) provides:

> 2. **Speedy trial.** It is the public policy of the state of Iowa that criminal prosecutions be concluded at the earliest possible time consistent with a fair trial to both parties. Applications for dismissals under this subsection may be made by the prosecuting attorney or the defendant or by the court on its own motion.
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> 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.

Iowa R. Cr. P. 27(2)(b).

While it is true that the Iowa supreme court and this court have held that "delay attributable to defendant may constitute statutory good cause preventing the State from carrying out its obligation to bring him to trial," we must find that defendant at least contributed to the cause of delay in order to find that delay may be attributed to him. *State v. Keys*, 535 N.W.2d 783, 787 (Iowa App. 1995). With a trial date two days following the end of the last continuance requested by defendant, delay beyond the deadline cannot be said to have resulted from the acts of defendant. Defendant resisted the State's request for further continuance and, in fact, at no time waived his right to speedy trial.

The four criteria for deciding the "good cause" issue, which are enumerated in *Barker v. Wingo*, 407 U.S. 514, 530-532, 92 S. Ct. 2182, 2191-2193, 33 L. Ed. 2d 101, 116-118 (1972), concern speedy trial rights under the United States Constitution. The Iowa supreme court, however, has alluded to those criteria as being useful in deciding the "good cause" inquiry. *State v. Donnell*, 239 N.W.2d 575, 578 (Iowa

1976). They are: length of delay, reason for delay, defendant's assertion of speedy trial right, and prejudice to defendant resulting from the delay. *Id.* at 578-579. In the *Donnell* case the court said the following:

> Turning to the four above criteria in weighing trial court's action, we note similar delays, although short, have been rejected as furnishing "good cause" where unaccompanied by reasonable excuse. *See State v. Sassman*, 226 N.W.2d 808, 809 (Iowa 1975); *State v. Hines*, 225 N.W.2d 156, 159 (Iowa 1975); *State v. Nelson*, 222 N.W.2d 445, 449 (Iowa 1974). Still, the fact the delay beyond the § 795.2 period incurred here is not lengthy gives it less weight in the ultimate determination to be made.

Id. at 579.

The critical inquiry is what was the cause of the delay. It is clear the only reason for the delay beyond the ninety-day limit was the State's motion for continuance, and its granting by the court, in order to allow the DNA evidence to be completed. The delay in processing DNA tests is a serious problem, without doubt. The same type of problem, except with a bit more prosecutor control, was the cause of delay in *State v. Sassman*, 226 N.W.2d 808 (Iowa 1975), where, due to a lack of secretarial help, no indictment/information was filed within thirty days, as required by statute. *Id.* at 809. The court, in ordering dismissal of the information that had been filed thirty-three days after defendant was held to answer a charge of robbery, stated:

> If we accept the failure of the county attorney to maintain adequate secretarial help as good cause for delay, the statutory provision becomes dependent upon nothing more than the personal convenience of the prosecutor, who could then excuse a failure to

> comply with the statute for a variety of reasons involving administrative breakdown in his office. We cannot believe this was the intent of the statute.
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> Recently, we held the inexcusable absence of jurors was insufficient cause to delay a trial beyond the 60-day period set out in § 795.2. *See State v. Hines*, supra, 225 N.W.2d at 161.

Id. at 809.

In *State v. Nelson*, 222 N.W.2d 445 (Iowa 1974), the "diminimus" argument was laid to rest. *Id.* at 449. (The limitation was only exceeded by six days.) In that case, the court said:

> Every limitation statute sets up an arbitrary date after which certain actions cannot be brought or certain rights cannot be enforced. One cannot escape the effect of such statutes by showing they were only violated a little bit. The statute prescribes the only way in which its impact may be avoided -- by a showing of good cause.

Id. That case also held the following:

> We refuse to approve the State's apparent position -- that it may await the production of evidence beyond the statutory period set out in § 795.1 and use that delay as good cause for ignoring that statute. The State had the burden to establish good cause for failure to file a county attorney's information within 30 days from the date defendant was held to answer. *State v. Bowers,* 162 N.W.2d 484, 487 (Iowa 1968). It did not do so under this record.

Id.

The Iowa supreme court, in *State v. Bowers*, 162 N.W.2d 484 (Iowa 1968), states:

> Section 795.2, which provides an accused must be tried within 60 days after indictment unless good cause for delay is shown, and section 795.1 have a long legislative history and constitute a clear legislative determination of what shall be considered a constitutionally

> permissible period in which to indict and bring an accused person to trial. These sections are intended to implement Article I, section 10 of our Bill of Rights. *State v. Gebhart*, 257 Iowa 843, 847, 134 N.W.2d 906, 908. We are bound by these legislative determinations unless we find they violate a fundamental concept of due process. We do not so find. It therefore is our duty to give full force and effect to the directive of section 795.1 even though it results here in release of one found guilty of a serious offense by a jury.

Id. at 487. In that case, the defendant had been found guilty of assault with intent to commit murder. *Id.* at 485.

The only issue in this case is whether the district court properly found good cause to grant the State's motion for continuance in order to allow the State to complete DNA testing. As in the case of *Nelson*, where the county attorney failed to file an information within thirty days because the results of the blood test of the defendant came back to his office under a former married name of the defendant, the court did not find that good cause existed for the case having gone beyond the thirty-day limit for filing the information. *See Nelson*, 222 N.W.2d at 450. The prosecutor was not excused for the delay in obtaining the blood test evidence in that driving-while-intoxicated case. *Id.* The case was dismissed. *Id.*

Should we, at some future time when some radically different process is developed that more nearly (but not exactly) identifies a defendant as the perpetrator of a crime, rule that since it takes six months to get the results of those tests -- challenged as they will certainly be -- good cause is shown to delay the commencement of trial? How long is too long? We embark on a subjective search for a solution. Meanwhile, a defendant whom we must consider may well be innocent sits in jail waiting for the State to assemble its evidence.

If the State requires the DNA evidence to try its case, it should make sure that it can be done in a timely fashion in order that the rights of the defendant are not compromised.

I would reverse the trial court. I believe that even though the crime involved is very serious, the defendant is entitled to a dismissal due to the violation of his right to a speedy trial under the rule.