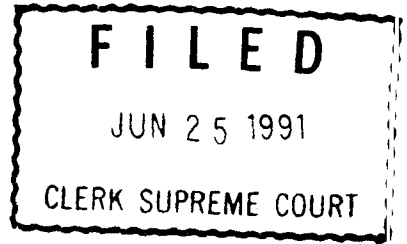


IN THE COURT OF APPEALS OF IOWA

No. 1-207 / 90-889



STATE OF IOWA,

Appellee,

278

vs.

ANDREA LAVONNE BURRAGE,

Appellant.

Appeal from the Iowa District Court for Scott County,
Margaret S. Briles, Judge.

The defendant appeals her conviction, following a jury
trial, for possession of heroin with intent to deliver.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, for
appellant.

Bonnie J. Campbell, Attorney General, Julie Ann
Halligan, Assistant Attorney General, William E. Davis,
County Attorney, and Realff H. Ottesen, Assistant County
Attorney, for appellee.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

PER CURIAM

On September 21, 1989, Andrea Burrage was charged by trial information with possession of heroin with intent to deliver. Under Iowa Rule of Criminal Procedure 27(2)(b), the State's ninety-day speedy trial period would expire on December 20, 1989.

On December 11, 1989, the State filed a motion to dismiss the charge because it had not yet received a DCI lab report. On December 12 the trial court granted the State's motion and dismissed the charge "in the interest of justice." A driving under suspension charge was also dismissed. That charge was not refiled and is not an issue here.

The State subsequently received the lab report. On January 16, 1990, the State filed a new information once again charging Burrage with possession of heroin with intent to deliver. On January 30 Burrage moved to dismiss this second charge on the ground her right to speedy trial had been denied. The trial court overruled this motion to dismiss.

A jury found Burrage guilty of possession of heroin with intent to deliver. She has appealed the resulting conviction.

Burrage once again contends her right to speedy trial was denied. She asserts her ninety-day speedy trial period should be measured from the date of the first indictment, September 21, 1989. She contends the December 12 dismissal

of the first indictment was merely a pretext to avoid and thwart her right to a speedy trial. She notes, among other things, the DCI lab report was dated November 29, 1989, twelve days before the dismissal motion allegedly prompted by the absence of such a report.

The State responds the December 12 dismissal was legitimate. It urges Burrage's speedy trial deadline did not begin to run until the date of the second trial information. The State asserts, despite the date on the DCI lab report, nothing in the record contradicted the trial court's finding the State had not actually received the lab report on December 11, the date of its dismissal motion. The State also suggests Burrage waived her appellate issue by failing to challenge the December 12 dismissal of the first information.

Our scope of review is for errors of law. Iowa R. App. P. 4.

The two rules involved in this claim are Iowa Rules of Criminal Procedure 27(1) and 27(2).

Rule 27(1) provides:

The court, upon its own motion or the application of the prosecuting attorney, in the furtherance of justice, may order the dismissal of any pending criminal prosecution, the reasons therefore being stated in the order and entered of record... such a dismissal is a bar to another prosecution for the same offense if it is a simple or serious misdemeanor, but it is not a bar if the offense charged be a felony or an aggravated misdemeanor.

(Emphasis added.)

Rule 27(2) provides:

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.

(a.) * * *

(b.) 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 the indictment to be dismissed unless good cause to the contrary be shown.

(Emphasis added.)

The Iowa Supreme Court has stated in a similar case:

[I]f it could be demonstrated that the prior dismissal, regardless of its stated purpose, was without adequate cause and that it impacted unfavorably upon a defendant's speedy trial rights, the resulting delay in prosecution would warrant a dismissal on speedy trial grounds. Any other interpretation ... would permit the State to employ dismissals under Iowa Rule of Criminal Procedure 27(1) in a manner which would thwart the defendant's speedy trial rights under rule 27(2).

State v. Gansz, 403 N.W.2d 778, 780 (Iowa 1987).

The supreme court found the defendant in Gansz acquiesced in the dismissal before the speedy trial deadline and subsequent refiling. Id.

The defendant was present, was aware of the assumption under which the district court was assigning the case for trial, and acquiesced in that date without bothering to advise the court that he believed his speedy trial rights were properly to be measured from [a different date].

Id.

In the present case the State informed the trial court and the defendant at the time of its motion to dismiss it

fully intended to refile the information as soon as it received the DCI report. Burrage made no objection at the time. She was aware of the State's position. She was also aware the dismissal was without prejudice under Iowa R. Crim. P. 27(1).

Burrage could have made the trial court aware of her position at the time of the first dismissal. She chose not to do so. As did the supreme court in Gansz, we determine Burrage acquiesced in the dismissal without prejudice while being fully aware of its implications. See 403 N.W.2d at 780. She may not now complain about the result allowed by her own inaction.

Additionally, we determine the trial court could have extended the speedy trial deadline for cause. The fact the State had not yet received the DCI report was a matter beyond its control. The State could justifiably seek a dismissal to procure the necessary evidence. State v. Knox, 464 N.W.2d 445, 446 (Iowa 1990).

We have held that facilitating the gathering of evidence is a proper reason for a rule 27(1) dismissal, and [the defendant] has failed to demonstrate any bad faith on the part of the State in seeking the dismissal to allow further investigation. [The defendant], in fact, did not resist the the motion, apparently agreeing that there were legitimate grounds for it.

Id.

We do not find the State sought the original dismissal in bad faith. It does not appear the State was deliberately attempting to harass the defendant or in any

way deny her rights. The State had good cause for seeking a dismissal to obtain the necessary evidence. Finally, Burrage did not object or otherwise inform the court of her position when she fully knew the State's intentions at the original dismissal.

We affirm the trial court.

AFFIRMED.

Hayden, P.J., and Habhab, J., concur; Sackett, J., dissents.

SACKETT, J. (dissenting)

I dissent. I would find the defendant's speedy trial rights were violated. The State operates through numerous branches. One of the branches is the Scott County attorney's office, and another of these is the DCI. Whether it was the fault of the county attorney's office or the DCI that the required evidence was not available to provide the defendant her right to a speedy trial is not an issue. In either case, the State was responsible for the delay. I cannot agree with the majority's conclusion that the fact the State had not received the report from the State DCI office was a factor beyond the State's control. The dismissal clearly impacted on the defendant's speedy trial rights.

The majority also relies on State v. Gansz, 403 N.W.2d 778, 780 (Iowa 1987). Gansz involved a defendant's failure to object to the setting of a trial date, not a failure to object to a dismissal. I do not find Gansz instructive.