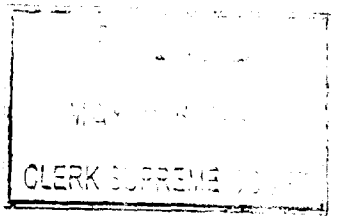
IN THE COURT OF APPEALS OF IOWA

No. 9-252 / 98-0703
Filed May 26, 1999

STATE OF IOWA,

Plaintiff-Appellee,



vs.

DANIEL LEROY HODGES,

Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, David M. Remly and Van D. Zimmer, Judges.

Defendant appeals from his conviction for first-degree robbery. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, J. Patrick White, County Attorney, and Anne M. Lahey, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Streit and Mahan, JJ. Zimmer, J., takes no part.

MAHAN, J.

Daniel Leroy Hodges appeals from his conviction for first-degree robbery. He contends his right to a speedy indictment was violated. We affirm.

After investigating an armed robbery at the Village Inn Pancake House in Iowa City, a police officer charged Hodges with first-degree robbery by citation. The citation was issued on December 6, 1995. At that time, Hodges was in the Linn County jail on other charges, and the officer met with Hodges that same day. A warrant for Hodges' arrest was issued, and a hold was placed on him for the Johnson County charge.

Hodges remained in the custody of a sheriff or the department of corrections until he was brought to Johnson County on February 28, 1997, pursuant to the 1995 arrest warrant. He made his initial appearance that day. The State filed a trial information on April 10, 1997. Thereafter, Hodges filed a motion to dismiss the charge based upon violations of Iowa Rule of Criminal Procedure 27(2)(a), as well as the Fifth[1] and Fourteenth Amendments to the United States Constitution. The district court denied the motion to dismiss. It concluded Hodges was not arrested until February 28, 1997, and the trial information was filed within the forty-five day period. The district court subsequently denied his motion to reconsider.

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[1] Hodges actually brought his claims under the Sixth and Fourteenth Amendments; however, as the State points out, his claim actually falls under the Fifth and Fourteenth Amendments.

Hodges ultimately waived his right to a jury trial and the court found him guilty of the offense. The court sentenced him to an indeterminate twenty-five-year term to run consecutively with other sentences not at issue on appeal.

Hodges appeals.

I. STANDARD OF REVIEW. We review claims based upon Iowa Rule of Criminal Procedure 27(2)(a) for correction of errors at law. *State v. Rains*, 574 N.W.2d 904, 909 (Iowa 1998); *State v. Dennison*, 571 N.W.2d 492, 494 (Iowa 1997). Our review of constitutional claims is de novo in light of the totality of the circumstances. *State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998); *State v. Trompeter*, 555 N.W.2d 468, 470 (Iowa 1996). We will give weight to the district court's findings of fact supported by substantial evidence. *State v. Finn*, 469 N.W.2d 692, 693 (Iowa 1991); *State v. Waters*, 515 N.W.2d 562, 566 (Iowa App. 1994).

II. SPEEDY INDICTMENT UNDER RULE 27(2)(a). Hodges argues he was "arrested" on the robbery charge on December 6, 1995, the day the warrant for Hodges' arrest was issued, and a hold was placed on him for the Johnson County charge. At that time, Hodges was in the Linn County jail on other charges. Hodges concedes the case law does not support his position. *See State v. Edwards*, 571 N.W.2d 497, 500 (Iowa App. 1997) (citing *Waters*, 515 N.W.2d at 566 (person not in custody of county authorities is not arrested for purposes of speedy indictment rule by mere bringing of the charge in that county; person must be in the custody of county authorities of county issuing arrest warrant for person to be under "arrest" for

purposes of speedy indictment rule); *State v. Beeks*, 428 N.W.2d 307, 309 (Iowa App. 1988) (defendant detained in first county's jail on second county's charges was "arrested" for speedy trial purposes on third county's charges when he submitted to custody of third county's sheriff)). Hodges, however, invites us to revisit the holdings in these cases. We decline to do so and conclude Hodges' motion to dismiss was properly denied on this basis.

III. PREACCUSATORIAL DELAY UNDER FIFTH AMENDMENT.

Hodges maintains his defense was prejudiced by the preaccusatorial delay. In order for Hodges to prevail on his due process claim based on preaccusatorial delay, Hodges must show (1) the delay was unreasonable; and (2) his defense was prejudiced by the delay. *See Trompeter*, 555 N.W.2d at 470. The due process protection afforded "in prosecutorial delay cases is available to defendants to make sure the State will not employ tricks to gain an advantage over a defendant." *State v. Isaac*, 537 N.W.2d 786, 788 (Iowa 1995). There is a similar burden under federal case law in that a defendant must show the delay substantially prejudiced his rights to a fair trial and the State's delay "was an intentional device to gain a tactical advantage over the accused." *United States v. Marion*, 404 U.S. 307, 324, 92 S. Ct. 455, 465, 30 L. Ed. 2d 468, 480-481 (1971).

In the case at bar, the record discloses no evidence that the preaccusatorial delay was unreasonable or otherwise improper; Hodges apparently remained incarcerated on unrelated charges throughout the period of delay. He contends his

defense was prejudiced by the delay because two eyewitnesses whose descriptions of the perpetrator of the robbery did not fit Hodges' description were not available at trial. However, "[g]eneralized assertions of loss of memory, loss of witnesses, or loss of evidence is insufficient to establish actual prejudice." *Edwards*, 571 N.W.2d at 501 (quoting *United States v. Manning*, 56 F.3d 118, 1194 (9th Cir. 1995)). Furthermore, the "lost" witnesses were listed as potential defense witnesses along with their addresses. Finally, the arrest was not based on the initial descriptions of eyewitnesses. Rather, the arrest was based upon linking the Village Inn robbery to a motel robbery for which Hodges had been arrested. Palm print evidence on a registration card filled out by Hodges at the motel was matched to palm print evidence on a job application filled out by the perpetrator of the Village Inn robbery. In addition, the same name was used on both the registration card and the job application.

We find Hodges is unable to prove either prong of the Fifth Amendment test and conclude his motion to dismiss was properly denied on this basis.

For these reasons, we affirm Hodges' conviction for first-degree robbery.

AFFIRMED.

No. 98-0703. [9-252] STATE v. HODGES

Appeal from the Iowa District Court for Johnson County, David M. Remly and Van D. Zimmer, Judges. **AFFIRMED.** Heard by Huitink, P.J., and Streit and Mahan, JJ. Zimmer, J., takes no part. Opinion by Mahan, J. (5 pages $2.00)

Daniel Leroy Hodges appeals from his conviction for first-degree robbery. He contends his right to a speedy indictment was violated. Hodges was charged with first-degree robbery of a Village Inn by citation issued on December 6, 1995. At that time, Hodges was in the Linn County jail on other charges, and the charging officer met with Hodges that same day. A warrant for Hodges' arrest was issued, and a hold was placed

No. 98-0703. [9-252] STATE v. HODGES (continued)

on him for the Johnson County charge. Hodges remained in the custody of a sheriff or the department of corrections until he was brought to Johnson County on February 28, 1997, pursuant to the 1995 arrest warrant. He made his initial appearance that day. **OPINION HOLDS. I.** ***Speedy Indictment Under Rule 27(2)(a).*** Hodges concedes the case law does not support his argument that he was "arrested" on the robbery charge on December 6, 1995, the day the warrant for Hodges' arrest was issued and a hold was placed on him for the Johnson County charge. Hodges, however, invites us to revisit the holdings in these cases. We decline to do so. **II.** ***Preaccusatorial Delay Under Fifth Amendment.*** In order for Hodges to prevail on his due process claim based on preaccusatorial delay, Hodges must show (1) the delay was unreasonable; and (2) his defense was prejudiced by the delay. In the case at bar, the record discloses no evidence that the preaccusatorial delay was unreasonable or otherwise improper; Hodges apparently remained incarcerated on unrelated charges throughout the period of delay. He contends his defense was prejudiced by the delay because two eyewitnesses whose descriptions of the perpetrator of the robbery did not fit Hodges' description were not available at trial. However, this assertion is insufficient to establish actual prejudice. Furthermore, the "lost" witnesses were listed as potential defense witnesses along with their addresses. Finally, the arrest was not based on the initial descriptions of eyewitnesses. Rather, the arrest was based upon other evidence linking the Village Inn robbery to a motel robbery for which Hodges had been arrested in Linn County. We find Hodges is unable to prove either prong of the Fifth Amendment test.