

IN THE COURT OF APPEALS OF IOWA

No. 5-094 / 94-0494

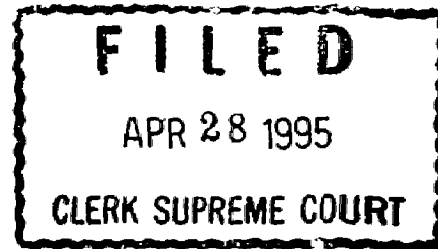
STATE OF IOWA,

Plaintiff-Appellee,

vs.

TONY LYNN HARDING,

Defendant-Appellant.



Appeal from the Iowa District Court for Jasper County, Thomas W. Mott,
Judge.

Tony Harding challenges his conviction of driving while license revoked on
speedy trial grounds. **AFFIRMED.**

Gerald B. Feuerhelm, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney
General, and James R. Wilson, County Attorney, for appellee.

Heard by Sackett, P.J., and Habhab and Huitink, JJ.

HABHAB, J.

On August 16, 1993, the State charged Tony Lynn Harding with driving while his license was revoked in violation of Iowa Code section 321J.21 (1993). Harding moved to have his case dismissed in February 1994 for the denial of his right to a speedy trial. The motion was denied. We affirm.

Harding appeared for arraignment on August 30, and a pretrial conference was set for October 25 with a trial to follow on November 3. An order resetting the pretrial conference for November 1 was entered on October 27. On November 1, an order was entered further resetting pretrial conference for November 15 "to allow defendant more time to request counsel." On November 15, 1993, an order was entered to reset the pretrial conference on defendant's motion for November 22 to allow defendant more time to request counsel. Harding then filed for the appointment of counsel and attorney Kjas Long was appointed to represent him. Proceedings were reset for December 6.

On December 30, an order was entered authorizing an arrest warrant for Harding due to his failure to appear on December 6. This order was filed on January 3, 1994. The arrest warrant was issued on January 5. On January 25, Harding filed a bond and the arrest warrant was cancelled. Harding appeared without counsel on February 1, and pretrial conference was reset for February 14.

Harding appeared in court with counsel on February 14 and a hearing was set for February 21 regarding Harding's motion to dismiss based on the denial of a speedy trial. The calendar entry for February 21 states, "The Court overrules the defendant's motion to dismiss for denial of speedy trial. The delays in trial have come at the defendant's request in some cases, and because the defendant failed to appear in court in other cases." Pretrial conference was then set for February 28.

After a recorded hearing on February 28 regarding the motion to dismiss for the denial of a speedy trial, the court again overruled the motion. The calendar entry stated, "Defendant, not held in custody, caused the delays in this case." After ruling on the motion, the matter proceeded to a trial on the minutes of testimony. Harding was found guilty of driving while his license was revoked in violation of Iowa Code section 321J.21.

Harding appeals. He claims the continuances were caused by the county attorney so Harding could obtain counsel he allegedly did not want.

Speedy trial questions under Iowa Rule of Criminal Procedure 27(2) are reviewed for correction of errors at law. Iowa R. App. P. 4. We are bound by the findings of fact supported by substantial evidence. *State v. Finn*, 469 N.W.2d 692, 693 (Iowa 1991); *State v. Boelman*, 330 N.W.2d 794, 795 (Iowa 1983). The defendant is only entitled to prevail if his evidence was so strong the trial court was compelled to rule for him as a matter of law. *Id.*

When a trial has not commenced within the ninety day period set out in Iowa Rule of Criminal Procedure 27(2)(b), the case must be dismissed by the court unless (1) the defendant waived his right to a speedy trial; (2) the delay is attributable to the defendant; or (3) "good cause" exists for the delay. *State v. Finn*, 469 N.W.2d 692, 694 (Iowa 1991); *State v. Bond*, 340 N.W.2d 276, 279 (Iowa 1983).

We find the district court properly overruled the motion to dismiss the case for two reasons. First, the "good cause" exception was met. Second, the delay was attributable, in part, to Harding.

Regarding the good cause exception to rule 27(2)(b), our supreme court has stated:

The good cause exception to trial within ninety days under Rule 27(2)(b) focuses on only one factor: the reason for the delay. Surrounding circumstances bear on the focal point of the inquiry but

only to the extent that they relate directly to the sufficiency of the reason itself. Such circumstances as a relatively short period of delay, failure of the defendant to demand a speedy trial, and the absence of prejudice may allow a weaker reason to constitute good cause; a stronger reason may be necessary in the absence of such factors.

Bond, 340 N.W.2d at 279. It has also been stated that a defendant must accept a delay which is reasonably necessary for action on his own motives for such delay constitutes good cause. *State v. Moehlis*, 250 N.W.2d 42, 46 (Iowa 1977); *State v. Searcy*, 470 N.W.2d 46, 47 (Iowa App. 1991).

Harding did not make any demand for a speedy trial. As for the period of delay, it could have been relatively short but for Harding's failure to show up for the scheduled pretrial conference in early December 1993. This failure on Harding's part caused an extension of the delay, during which a warrant for his arrest was issued. As a result of these factors and in light of the discussion in *Bond*, a weaker reason may constitute good cause.

The good cause delay in this case was caused by Harding's failure to obtain an attorney. While Harding contends he did not want or request an attorney, the record simply does not support his position. Harding admitted he never told the judge he did not want an attorney. The judge was of the belief Harding wanted or needed an attorney. The calendar entries show Harding needed more time to find an attorney. In fact, one calendar entry shows one delay was on Harding's own motion to allow for more time to get an attorney. Harding even filed an application for the appointment of counsel. None of this is consistent with Harding's claim he did not want an attorney. The record presented before us does not provide any support for his contentions. We deem a delay in order for the defendant to obtain counsel to be good cause in this particular case.

Regarding the "delay attributable to the defendant" exception, our supreme court has stated:

The obvious purpose of the time periods contained in rule 27 is to implement the constitutional provisions that require a speedy trial. These rules were not intended to provide a defendant with a weapon to trap state officials and terminate prosecutions. Nor were they intended to be a device to give a defendant absolute immunity from prosecution. See State v. Zaehring, 306 N.W.2d 792, 796 (Iowa 1981). [The defendant] may not actively, or passively, participate in the events which delay his trial and then later take advantage of that delay to terminate prosecution.

Id., 469 N.W.2d at 694. We find Harding actions and inactions were sufficient to meet this exception to the speedy trial requirement. In addition, if Harding had told the court he did not want an attorney, then a delay would not have occurred. Harding passively participated in the delay by not making any contrary intention known.

In addition, after the ninety day period had expired, Harding greatly increased the delay by his own actions. Harding failed to show up for his pretrial conference set for December 6, 1993. Had he attended this conference, the trial date could have been fixed sooner.

We find Harding's own participation in the numerous delays in this case, both passively and actively, make the delay attributable to him. We do not believe Harding should be allowed to cause a delay or to passively allow a delay to occur and then later take advantage of such delay to terminate the prosecution. As a result, we conclude the district court had a second ground to properly overrule the motion to dismiss.

AFFIRMED.

Huitink, J. concurs; Sackett, P.J., dissents.

SACKETT, J. (dissenting)

I dissent. Defendant's speedy trial rights were violated. Defendant faithfully appeared as ordered and did not want an attorney. The trial court's decision he should have an attorney should not be controlling.