FILED
JUN 29 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed June 29, 1982 150

vs.)

NATHAN LEE BURGS,) 0-427
63272

Defendant-Appellant.)

Appeal from Polk District Court - Ray Fenton, Judge.

Defendant Nathan Lee Burgs appeals from his conviction for robbery in the first degree in violation of section 711.2, Supplement to the Code 1977. AFFIRMED.

James Cleary, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Julie Pottorff, Assistant Attorney General, for plaintiff-appellee.

Considered en banc.

DONIELSON, J.

Defendant Nathan Lee Burgs appeals from his conviction for robbery in the first degree in violation of section 711.2, Supplement to the Code 1977. We affirm.

I.

Defendant was charged by trial information with the armed robbery of a liquor store on June 27, 1978. Mr. Burgs made a preliminary appearance in the district court on June 28, 1978. On the same date, Burgs applied for appointment of counsel, since he was indigent, and Attorney Gene L. Needles of Des Moines, Iowa, was appointed to represent Burgs on July 3, 1978, by order of Judge Ray A. Fenton.

Attorney Needles filed a notice of appearance for Mr. Burgs on July 11, 1978. A trial information was filed against Mr. Burgs on July 25, 1978. Mr. Burgs was formally arraigned on July 27, 1978, and his trial date was scheduled for October 16, 1978, at 9 a.m. by order of Judge Luther Glanton.

The court file reflects that the state subpoenaed all of its witnesses on or about October 12, 1978, for Mr. Burgs' trial scheduled on October 16, 1978. On October 11, 1978, Attorney Needles requested a continuance of Mr. Burgs' case due to a conflict with another scheduled trial for Mr. Burgs.

On October 17, 1978, Mr. Needles filed a request to withdraw from his appointment citing a strained relationship with Mr. Burgs. The court file then reflects that on October 23, 1978, Mr. Needles was allowed to withdraw as counsel, Mr. Burgs' trial on the robbery charge was continued until December 18, 1978, and Judd Golden was appointed to represent Mr. Burgs.

A jury trial began on December 18, 1978. When the jury was unable to reach a verdict, a mistrial was declared and a new trial ordered. During the second trial, two eyewitnesses identified defendant as the person who robbed the liquor store. On February 23, 1979, the jury found the defendant guilty of the charge and

further found, in response to a special interrogatory, that the defendant had used a dangerous weapon in the robbery. The defendant was then sentenced to a period of imprisonment not to exceed 25 years with a mandatory minimum of 5 years to be served as required by section 902.7, Supplement to the Code 1977. The defendant then filed notice of this appeal.

II.

Defendant first contends that the trial court erred in admitting certain exhibits into evidence because the State failed to demonstrate their relevancy and thus to lay the proper foundation for their admission. We find no merit in this contention.

Over defendant's objection, the trial court admitted into evidence a bank bag, a roll of nickels, a roll of quarters, and a pistol and handgrip. All these items were found pursuant to a search of the apartment in which the defendant was arrested; all of them, with the exception of the gun and handgrip, were positively identified by liquor store employees as having been taken from the store during the robbery. Although the gun was not positively identified, employees said the robber had displayed a gun and one employee testified that the gun admitted into evidence looked like the one the robber had used.

Defendant contends that the relevancy of these exhibits was never established because it was never shown that they bore any connection to the defendant. We disagree. Although these items were discovered at the apartment of another person, the defendant was present in the apartment when they were found. There is evidence to connect the items to the robbery of the liquor store and evidence in the form of eyewitness testimony that the defendant was the robber. We find this to be sufficient evidence of a connection between the defendant and the State's exhibits 1 through 4. The relevance of items offered into evidence is determined by the extent to which the offered evidence makes

the desired inference more probable than it would be without it. McCormick on Evidence § 185, at 437 (2d ed. E. Cleary 1972). Moreover, a gun shown to have been available to the defendant is admissible to complete the picture of circumstances surrounding the events, even though not positively identified as the gun actually used in commission of the crime charged. State v. Nowlin, 244 N.W.2d 596, 602 (Iowa 1976); State v. Shultz, 231 N.W.2d 585, 588 (Iowa 1975). It is only necessary to show that the gun sought to be admitted was found under circumstances affording a basis for a reasonable inference that it was used in commission of the crime. State v. Galvan, 181 N.W.2d 147, 151 (Iowa 1970); see State v. Johnson, 162 N.W.2d 453, 456 (Iowa 1968). Applying these considerations to the instant case, we find no error in admitting these items into evidence.

Defendant raises a further allegation with respect to the pistol found in the search of the apartment. He contends that there was insufficient evidence to show that the defendant was armed with a dangerous weapon and that therefore the trial court erred in imposing a mandatory minimum sentence of 5 years pursuant to section 902.7, Supplement to the Code 1977. We do not agree.

In order for the mandatory minimum sentence provision of section 902.7 to be applicable, the trier of fact must find beyond a reasonable doubt that the person charged is guilty of a forcible felony and that the person was armed with a firearm in the commission thereof. § 902.7, Supplement to the Code 1977. See also State v. Matlock, 289 N.W.2d 625, 629 (Iowa 1980). We think that there was sufficient evidence to permit the jury to find beyond a reasonable doubt that the defendant was armed with a firearm in the commission of the robbery. Again, there was eyewitness testimony that the robber displayed a gun and eyewitness testimony that the defendant was the robber. The gun admitted into evidence was found in the apartment in which the defendant was arrested. We conclude that the defendant was properly sentenced under the mandatory minimum sentence provision of section 902.7.

III.

Defendant next contends that the in-court identifications of the defendant by two witnesses were improperly allowed at trial because pre-trial identification procedures involving the same witnesses were so suggestive and unreliable as to violate his right to due process of law. In essence, the defendant argues that once identification evidence is tainted by the use of impermissibly suggestive procedures, any succeeding testimony regarding the identity of the individual should be suppressed. We find that the defendant has misstated the applicable law and hold that the in-court identifications were properly allowed.

The two witnesses involved had made out-of-court identifications of the defendant based in part on a photo array and they later identified the defendant in court. Defendant moved to suppress both the in-court and out-of-court identifications on the ground that the photo array was unduly suggestive. After a hearing (the transcript of which was not made part of the record on appeal), the trial court sustained the motion in regard to the out-of-court identifications but allowed the State to present evidence, at the discretion of the court, concerning the in-court identifications.

When evidence of a pretrial identification has been suppressed as being unduly suggestive, an in-court identification by the same witness will not be allowed into evidence if it stems from, and thus is tainted by, a pretrial identification procedure "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Coleman v. Alabama, 399 U.S. 1, 5, 90 S. Ct. 1999, 2001, 26 L. Ed. 2d 387, 394 (1970) (quoting Simmons v. United States, 290 U.S. 377, 384, 88 S. Ct. 967, 971, 19 L. Ed. 2d 1247, 1253 (1968)); State v. Ash, 244 N.W.2d 812, 814 (Iowa 1976), cert. denied, 430 U.S. 918, 97 S. Ct. 1334, 51 L. Ed. 2d 597 (1977); see State v. Washington, 257 N.W.2d 890, 893-94 (Iowa 1977). Our review of the record indicates that the in-court identifications of

these two witnesses were independent in origin and not tainted by the illegal pretrial procedure. One of the witnesses stated on cross-examination that had she never seen the photographs, she would still have been able to identify the defendant in court; she said that her memory of the photos was vague at best. The other witness gave a very detailed description of the robber's clothing and of his actions both before and after entering the liquor store and stated that there was no doubt in her mind that the defendant was the person she had seen. Mindful that unreliability is the primary evil to be avoided in challenges to the admission of identification testimony, see Neil v. Biggers, 409 U.S. 188, 198, 93 S. Ct. 375, 381, 34 L. Ed. 2d 401, 410 (1972), we conclude that the in-court identifications were properly allowed into evidence.

IV.

Defendant asserts he was denied a speedy trial in violation of his rights as secured by the Iowa and United States Constitutions because defendant did not personally waive his right to a speedy trial or approve Mr. Needles' request for a continuance. Thus, defendant asserts he is entitled to a dismissal of the charges against him under Iowa R. Crim. P. 27(2)(b), which states:

> 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.

§ 795.2, The Code 1975, the statutory predecessor to Iowa R. Crim. P. 27(2)(b), was interpreted by the Iowa Supreme Court in State v. O'Connell, 275 N.W.2d 197, 200 (Iowa 1979). In O'Connell, the defendant asserted that the right to a speedy trial could only be waived personally after being fully advised of the nature of the right. We find the portion of O'Connell set out below to be dispositive of this issue.

> Ordinarily a criminal defendant is bound by his or her or counsel's actions taken on the client's behalf. Faretta v. California, 422 U.S. 806, 820, 95 S. Ct. 2525, 2534, 45 L. Ed. 2d 562, 573 (1975); State v. Benson, 247 Iowa 406, 410, 72 N.W.2d 438, 441 (1955); Shores Co. v. Iowa Chem. Co., 222 Iowa 347, 350-51, 268 N.W. 581, 582-83 (1936). See also § 610.16(1) (attorney has authority to execute in client's name any instrument necessary in the prosecution or defense of an action). The word "his" in § 795.2 must be read in conjunction with § 610.16(1) and supportive case law.
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> Interpreting § 795.2 in this light, we conclude the legislature intended speedy trial rights would be waived by continuance motions made by the defense, not merely those made by defendant.

The delays in this case are clearly attributable to both defendant and his attorney. Granted the record indicates that defendant and his attorney, Mr. Needles, did not have a good personal and professional relationship; however, we see no evidence to indicate Mr. Needles' motion for a continuance was not a good faith attempt to diligently represent the defendant. Therefore, we find this motion was a waiver of defendant's right to a speedy trial.

V.

Finally, defendant contends that various actions and omissions of his attorney deprived him of effective assistance of counsel at trial. Review of defendant's allegations on this question requires that we determine whether, considering all the circumstances, counsel's performance was within the range of normal competency in the profession. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980); State v. Hicks, 277 N.W.2d 889, 896 (Iowa 1979); State v. Killpack, 276 N.W.2d 368, 372 (Iowa 1979); State v. Veverka, 271 N.W.2d 744, 750 (Iowa 1978) (quoting State v. Rand, 268 N.W.2d 642, 648 (Iowa 1978)). To make such a determination, however, we must be supplied with an adequate record. State v. Kellogg, 263 N.W.2d 539, 544 (Iowa 1978). This record does not support a finding that defendant was denied effective assistance of counsel. See State v. Smith, 282 N.W.2d 138, 143-44 (Iowa 1979).

AFFIRMED.