IN THE COURT OF APPEALS OF IOWA

No. 0-072 / 98-1163
Filed May 10, 2000

FILED
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CLERK SUPREME COURT

STATE OF IOWA,
Appellee,

vs.

TOBY LEE SWAIM,
Appellant.

Appeal from the Iowa District Court for Wapello County, Dan F. Morrison (pretrial motions) and E. Richard Meadows, Jr. (trial and sentencing), Judges.

Toby Swaim appeals his conviction and sentence following a jury trial for theft in the third degree in violation of Iowa Code sections 714.1 and 714.2(3) (1997). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Nan Jennisch, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Chris Odell, Assistant Attorney General, Victoria Siegel, County Attorney, and Ronald W. Kelly, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

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[redacted]waim, defendant, appeals his conviction and sentence following a jury trial for theft in the third degree in violation of Iowa Code sections 714.1 and 714.2(3) (1997). Swaim argues the trial court should have dismissed the charges because his right to a speedy trial was violated. Because we find he waived that right, we affirm.

Background facts. Swaim was charged on April 7, 1997, for a February incident involving a theft. He signed a written arraignment and plea of not guilty to the charge. The pre-printed form contained the language necessary to waive a speedy trial. However, Swaim crossed out the word "waive" and started to write something else in. Then he crossed that out and wrote the word "OK" above "waive." The trial court determined this was too ambiguous to accept as a waiver and deemed the speedy trial rule would apply. After a series of pre-trial conferences, hearings on motions and rescheduling, the trial commenced on April 20, 1998, well over the ninety-day speedy trial requirement. Swaim contends his conviction should be overturned because the State failed to meet its obligation to prosecute him in a timely manner.

Scope of review. Our standard of review for speedy trial issues under Iowa Rule of Criminal Procedure 27(2)(b) is for corrections of errors at law. *State v. Finn*, 469 N.W.2d 692, 693 (Iowa 1991). 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. *Id.*

[redacted] requires that an accused be brought to trial within ninety days [redacted]. The rule applies equally to charges brought by trial information. *State v. Peterson,* 288 N.W.2d 332, 334 (1980). 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).

Defendants have no duty to bring themselves to trial. *State v. Hines,* 225 N.W.2d 156, 158 (Iowa 1975). It is the State's duty to effectuate the rule requiring trial within ninety days, absent good cause. *Id.* Moreover, once the ninety-day period expires, the burden remains on the state, to establish an exception to the ninety-day rule. *Todd,* 468 N.W.2d at 469.

Waiver of speedy trial. Swaim contends the court should have been bound by its earlier decision, finding no waiver. The district court initially ruled that a waiver did not exist due to the ambiguous nature of the signed arraignment. However, in February 1998, Swaim, having been arrested and jailed on different charges, wrote a handwritten letter to the court, reinstating his previously waived right to a speedy trial. Swaim wrote:

> I waived my right to a speed [sic] trial on FECR004902. I want to take back that right and Have my Speedy trial Now.

In the ruling on the motion to dismiss, the trial court noted:

> The record indicates that both parties believed this case was not a speedy demand by the way the case proceeded. The defendant was not in jail at the time of the written arraignment and that is surely the reason he wrote OK above "waived." *His letter of*

[redacted] affirms his belief that he had waived his speedy trial rights. ([redacted] added).

We need look no further than to Swaim's own words to agree with the district court's conclusions. Therefore, we find Swaim did waive his right to a speedy trial. He reinstated that right on February 13, 1998, and the trial took place within the appropriate time limit thereafter, on April 20, 1998.

Swaim also urges this court to apply a "knowing and intelligent standard" to a speedy trial waiver. However, having failed to raise this issue at the trial court level, we cannot address it on review. *State v. Kinkead,* 570 N.W.2d 97, 102 (Iowa 1997) (concluding issues cannot be raised for the first time on appeal).

Because we find Swaim waived his right to a speedy trial, we affirm.

AFFIRMED.